Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ODIE WASHINGTON, Director, Illinois Department of Corrections, in his official capacity,

Petitioner,

v.

MICHAEL BARGER and RICHARD MAEZ, individually and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a statutory amendment that eliminates participation in educational programs for prisoners convicted of certain crimes violate the *ex post facto* clause of the United States Constitution where a prisoner may earn additional good conduct credits toward early release by successful completion of such programs, but where participation in such programs had always been contingent upon adequate state funding, academic success, and incarceration location and status?

LIST OF PARTIES

The Petitioner, Odie Washington, is the director of the Illinois Department of Corrections and the successor to Howard Peters, III, who was the director of the Illinois Department of Corrections at the time this case was considered by the state trial court and was the defendant and appellant below.

The named Respondents are representatives of a class certified by the state trial court as:

> All persons who: 1) committed offenses on or after September 10, 1990 to and including August 10, 1993, 2) have been or will be committed to the Illinois Department of Corrections, 3) were or would have been eligible on August 10, 1993 for the 1.25 enhanced educational good conduct credit under Pub. Act 86-1373 (730 ILCS 5/3-6-3(a)(4) (1993)), and 4) were rendered ineligible for enhanced educational good conduct credit under Pub. Act 88-311 (eff. August 11, 1993).

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ODIE WASHINGTON, Director, Illinois Department of Corrections, in his official capacity,

Petitioner,

v.

MICHAEL BARGER and RICHARD MAEZ, individually and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

Odie Washington, Director of the Illinois Department of Corrections, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reprinted in the appendix hereto, p. App. 1, *infra*, and is reported *sub nom. Michael Barger, et al. v. Howard Peters III, Director of Corrections*, at 163 Ill. 2d 357, 645 N.E.2d 175 (1994).

The order of the Circuit Court of Cook County, Illinois, dated January 27, 1994, granting a permanent injunction is not reported, but is reprinted in the appendix at p. App. 11. The final order of that court dated February 8, 1994, certifying the class of plaintiffs and extending the permanent injunction to that class is also not reported, but is reprinted in the appendix at pp. App. 12-14.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on December 22, 1994, affirming the permanent injunction entered by the Circuit Court of Cook County, Illinois. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The federal question whether a state amendment violated the *ex post facto* prohibition of the United States Constitution was raised in the respondents' complaint. C2 at ¶ 1. The Circuit Court of Cook County Illinois found the amendment did violate that provision of the Constitution. pp. App. 12-14. The Supreme Court of Illinois, directly reviewing the trial court pursuant to its own Rule 302(a), 134 Ill. 2d R. 302(a), affirmed. pp. App. 1-10.

CONSTITUTIONAL PROVISIONS AT ISSUE

No State shall. . . pass any . . . ex post facto Law . . . .

U.S. Const. art. I, § 10.

No ex post facto law . . . shall be passed.

Ill. Const. art. I, § 16.

STATUTORY PROVISIONS AT ISSUE

Section 15 of Public Act 88-311, 1993 Ill. Laws 2611-13, effective August 11, 1993.

Public Act 86-1373, 1990 Ill. Laws 2844-45, effective September 10, 1990.

The above statutes are reproduced in the appendix beginning at p. App. 16.

STATEMENT OF THE CASE

I. Elimination of the Opportunity to Participate in Educational Programs for Prisoners Convicted of Certain Crimes.

Effective September 10, 1990, Illinois amended its Unified Code of Corrections to provide for an enhancement of automatic day-for-day good conduct credits prisoners were given toward early release by a factor of 1.25 for prisoners participating in educational programs. *See* 730 ILCS 5/3-6-3 (1992). The amendment provided:

> Educational programs . . . shall be made available to any inmate seeking admission to such programs within the limits of fiscal resources appropriated by the General Assembly for such purpose. Eligible inmates who are denied immediate admission shall be placed on a waiting list under criteria established by the Department. The inability of any inmate to become engaged in any such educational program by reason of insufficient program resources or for any other reason established under the rules and regulations of the Department shall not be deemed a cause of action under which the Department or any employee or agent of the Department shall be liable for damages to the inmate.

p. App. 21.

Regulations implementing the amendment provided for the award of educational good conduct credits provided: 1) the prisoner was eligible to receive good time in accordance with other regulations; 2) the prisoner had not been convicted of a crime specifically excluded; 3) the prisoner had not been convicted of a felony committed after a previous award of educational good conduct credits; and 4) the prisoner achieved educational goals established for him by the Department of Corrections within a specified period. pp. App. 27.

The regulations provided for revision of the goal period to the date of removal from a program under certain circumstances, including placement in protective custody or transfer for non-disciplinary reasons. However, they also provided that a prisoner not receive any educational good conduct credits if he is removed from the educational program for any other reason. They further provided that the Director of the Department of Corrections could suspend educational programs "for reasons including, but not limited to, safety and security, budgetary constraints, insufficient program resources, inadequate space or unavailability of educational staff." pp. App. 28-30.

Nearly three years later, effective August 11, 1993, Illinois again amended its statutes to, among other things, increase the enhancement factor to 1.50 and exclude from eligibility for enhancement those convicted of criminal sexual assault, felony criminal sexual abuse, aggravated criminal sexual abuse, and aggravated battery with a firearm, as well as those who had previously served more than one felony sentence. p. App. 17. The legislative debates on this amendment indicate that, due to inadequate funding, there were at that time 4,000 prisoners on a waiting list to enter educational programs. p. App. 32.

The trial court found Respondents Barger and Maez were representatives of a class described as:

> All persons who: 1) committed offenses on or after September 10, 1990 to and including August 10, 1993, 2) have been or will be committed to the Illinois Department of Corrections, 3) were or would have been eligible on August 10, 1993 for the 1.25 enhanced educational good conduct credit under Pub. Act 86-1373 (730 ILCS 5/3-6-3(a)(4) (1993)), and 4) were rendered ineligible for enhanced educational good conduct credit under Pub. Act 88-311 (eff. August 11, 1993).

p. App. 13.

II. How the Federal Question Was Presented.

Respondents' complaint alleged that application of the 1993 amendment to their disadvantage violated the *ex post facto* clauses of both the Illinois and the United States Constitutions. C2 at ¶ 1. The Circuit Court of Cook County found the amendment violated both federal and state *ex post facto* clauses. p. App. 13. The Supreme Court of Illinois, directly reviewing the trial court pursuant to its own Rule 302(a), 134 Ill. 2d R. 302(a), affirmed both findings. pp. App. 1-10. It interpreted the state clause in step with the federal clause. p. App. 3.

III. The Decision of the Supreme Court of Illinois.

After first determining that the state constitution's *ex post facto* prohibition must be interpreted in a manner consistent with this Court's construction of the Federal *ex post facto* clause, the Supreme Court of Illinois found that the 1993 amendment violated the *ex post facto* prohibitions of both constitutions.

Of the categories of *ex post facto* laws set out in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798), the court found relevant those "that change[ ] the punishment, and

inflict[ ] a greater punishment, than the law annexed to the crime when committed." pp. App. 4-5. Citing to *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), the court noted that "[i]f the law does not so affect the punishment associated with a crime, it is of no moment that the law may work to a prisoner's disadvantage." p. App. 5. However, relying upon this Court's earlier decision in *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), the court reasoned that "punishment" is not to be equated with "sentence" and found that:

> any legislation curtailing the possibility of reducing actual prison time makes more onerous the consequence associated with a crime. It is entirely inconsequential that capitalizing on the opportunity may depend on an inmate's success in staying out of trouble or attaining other goals.

p. App. 5. Because it found that the 1993 amendment "curtails the opportunity for an earlier release . . . and so makes more burdensome the punishment associated with the crimes of the plaintiff class," it found that amendment was *ex post facto*. p. App. 6.

Justice Heiple filed a dissent with which Justice Nickels joined. He suggested that the majority was, in essence, applying the broad interpretation of *ex post facto* rejected in *Collins*, i.e., that there is an *ex post facto* violation whenever a law retroactively works to a prisoner's disadvantage. p. App. 7. In his view, the majority ignored that portion of the *Calder* definition that requires that the law in issue change the punishment "annexed to the crime, when committed," p. App. 8, *citing Calder*, 3 U.S. at 390, and raised questions as to the thousands of prisoners waiting to enter an educational program. p. App. 8.

Justice Heiple stated that the 1993 amendment met the purpose of the *ex post facto* prohibition to "assure that legis-

lative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Id., citing Weaver*, 450 U.S. at 28-29. He recognized that automatic credit for good behavior was a law annexed to the crime, but believed that the educational good conduct credits in issue were not. pp. App. 9-10. He stated: "[t]he arbitrary and uncertain availability of the educational programs precludes any suggestion that criminals anticipate that their sentences will be reduced if they choose to participate in educational programs." p. App. 10.

REASONS FOR GRANTING THE WRIT

I.

Review by this Court Is Necessary to Resolve Conflicts in Principle Between Lower Courts and to Eliminate Confusion and Uncertainty in the State Legislatures, Thereby Allowing the States to Confidently Address an Area of Great Public Importance.

Like many of its sister states, Illinois is attempting to resolve the problems of prison overcrowding and recidivism while remaining fiscally sound. After extensive study and debate, it determined that the best means of achieving its objectives was to allow prisoners to earn credits toward early release by successfully completing educational programs. *See* Transcript of the Illinois Senate Debate, 88th General Assembly, April 16, 1993, (First Proof) at pp. App. 31-40.[1] However, under the program adopted, no prisoner

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[1] The debate continues. Between January 1 and March 7, 1995, fourteen bills have been introduced in the Illinois General Assembly that would alter the early release provisions contained in section 3-6-3 of the Illinois Unified Code of Corrections. 730 ILCS 5/3-6-3 (1992). They are House Bills 298, 299, 594, 643, 706, 1052, 1175, 1636, 1722, 2038, and 2089 and Senate Bills 142, 558, and 1118.

could be assured that he would have an opportunity to participate in an educational program for a number of reasons. *See* pp. App. 21, 24-30. Lack of financial resources alone created a waiting list of over 4,000 prisoners for these programs. p. App. 32.

In the decision below, the Supreme Court of Illinois ruled that any reduction in the scope of the program would violate the *ex post facto* clause for those adversely affected who had committed their crimes while the program was in full force. It reasoned:

> any legislation curtailing the possibility of reducing actual prison time makes more onerous the consequence associated with a crime. It is entirely inconsequential that capitalizing on the opportunity may depend on an inmate's success in staying out of trouble or attaining other goals.

p. App. 5.

This reasoning poses significant logistical problems for corrections officials. To avoid *ex post facto* implications, they may need to administer every program a state has used that might potentially reduce time spent in prison and apply each on nearly an individual basis depending upon the time each prisoner committed his particular crime. The more practical solution may be for states to curtail experimentation in correctional programs. Such rigidity would be beneficial only if there was some confidence that current programs were adequately achieving their goals. That does not seem to be the case. States are using a variety of programs and frequently alter those programs as they search for efficacious means to reduce their prison populations and recidivism. *See*, e.g., *supra* at 7 n.1. *See also* James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 U.C.L.A. L. Rev. 217, 226-28 (1982) (charting state early release provisions then in force).

Given the generally prevailing dissatisfaction with incarceration programs, changes and experimentation should be encouraged, not discouraged. Yet, the effect of the holding in the decision below and of the confusion it generates is likely to hinder the states' ability to experiment with early release programs to find the best solution to a difficult problem.[2]

The confusion caused by the decision below is compounded by the fact that it conflicts in principle with a more recent decision of the United States Court of Appeals for the Eleventh Circuit. In *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), the Eleventh Circuit found that the State of Florida's switch from a "provisional credit" early release system to a "control release" program (both providing mechanisms for early release based upon the prison population level) did not violate *ex post facto* prohibitions, even though the former had applied to murderers while the latter did not. *See Herring v. Singletary*, No. TCA 93-40298-MMP, 1995 U.S. Dist. LEXIS (N.D. Fla. Feb. 16, 1995) (a magistrate's report and recommendation that relied on *Hock* and more fully sets out the details and history of Florida's early release provisions, including that at issue in *Hock*).

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[2] Moreover, the rationale used in the decision below has implications for related issues. This Court has pending before it review of a decision of the United States Court of Appeals for the Ninth Circuit involving the question whether a retrospective decrease in the frequency of parole suitability hearings constitutes an *ex post facto* violation. *California Department of Corrections v. Morales*, No. 93-1462 (argued January 9, 1995). Believing there was a significant relationship between frequency of parole hearings and early release provisions, the Supreme Court of Illinois relied heavily upon its own opinion in this area to decide the case at bar. p. App. 4, *citing Tiller v. Klincar*, 138 Ill.2d 1, 561 N.E.2d 576 (1990), *cert. denied*, 498 U.S. 1031 (1991).

Like the Supreme Court of Illinois, the Eleventh Circuit relied on *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), but found that control release, being "procedural" and "for the convenience of the [Florida] Department of Corrections," did not affect *punishment* and could not give rise to an *ex post facto* violation. 41 F.3d at 1472. It reasoned: "Because control release is based on an arbitrary and unpredictable determinant, the prison population level, an inmate has no reasonable expectation at the time he is sentenced that the prison population will reach the specified triggering level and that his incarceration will therefore be reduced." 41 F.3d at 1472-73. Guided by *Weaver*, the Eleventh Circuit stated: "The Ex Post Facto Clause operates not to protect an individual's right to less punishment, but rather as a means of assuring that an individual will receive fair warning of criminal statutes and the punishments they carry." 41 F.3d at 1471-72.

The courts' two analyses can hardly be more divergent. While the Eleventh Circuit reasons the *ex post facto* clause does not operate "to protect an individual's right to less punishment," 41 F.3d at 1471-72, the Illinois court finds any curtailment of the possibility of reducing time spent in prison to be a violation of the *ex post facto* clause. p. App. 5. Moreover, both courts purport to base their analyses on this Court's decision in *Weaver*.

Review by this Court is necessary to resolve the conflict in principle between Supreme Court of Illinois and the Eleventh Circuit. Guidance is required to clarify the implications of this Court's holding in *Weaver* and to allow the States to confidently attack the problems of prison overcrowding and recidivism.

II.

The Supreme Court of Illinois Should Be Reversed Because it Misapplied this Court's Ruling In *Weaver*, Failed to Apply this Court's Ruling in *Collins*, and Misunderstood What Constitutes "Punishment . . . Annexed to the Crime" Within the Meaning of *Calder* and the *Ex Post Facto* Clause.

In reaching its holding, the majority of the Supreme Court of Illinois failed to apply this Court's holding in *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), that retrospective legislation creating a mere disadvantage to prisoners is insufficient to establish an *ex post facto* violation and misunderstood this Court's centuries-old holding in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648 (1798), that acts like that in issue violate *ex post facto* prohibitions only when they increase "punishment . . . annexed to the crime." The majority also failed to appreciate that the facts before this Court in *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), involved retrospective reduction of automatically credited early release time whereas the early release time in dispute must not only be earned, but is contingent on many factors beyond the control of the prisoner. The contingencies not only involve effort, but factors such as aptitude, security, sufficient staffing, and adequate funding. pp. App. 28-30.

In *Collins*, this Court unequivocally stated that its interpretation of the prohibition of the *ex post facto* clause is the same as the interpretation it provided nearly 200 years ago in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798). The Court stated that the categories set out in *Calder* still define the prohibition:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that

> *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

Collins, 497 U.S. at 42, *quoting Calder*, 3 U.S. (3 Dall.) at 390 (emphases in *Calder*); *see Collins*, 497 U.S. at 47.

This Court in *Collins* specifically rejected its prior holding in *Kring v. Missouri*, 107 U.S. 221, 2 S. Ct. 443, 27 L. Ed. 506 (1883), which had suggested that the categories of *ex post facto* laws set out in *Calder* were not exhaustive and that it might also be an *ex post facto* violation for a law merely to, "in relation to the offence or its consequences, alter[] the situation of a party to his disadvantage." *Collins*, 497 U.S. at 48-49 (emphasis deleted), *quoting Kring*, 107 U.S. at 228-29.

While obviously not applying the later ruling in *Collins* and not explicitly using the language of *Calder*, this Court in *Weaver* in effect found that a retrospective decrease in the type of early release time that is automatically credited to a prisoner and, as long as he merely stays out of trouble, retained and used by that prisoner is an increase in "punishment . . . annexed to the crime." It did *not* hold that the same would be true of a retrospective decrease in any type of early release time. In fact, in rejecting the State of Florida's argument that the reduction in automatic "good time" was sufficiently compensated by an increase in discretionary good time, this Court recognized that the several types of good time are distinct. 450 U.S. at 35-36.

One of the types of good time labeled as "discretionary" in *Weaver* was good time based upon "diligent performance in an academic program." 450 U.S. at 35. In a footnote, this

Court stated that "[t]he discretionary extra gain time cannot fully compensate for the reduced accumulation of gain time for good behavior *for the discretionary credit is more uncertain.*" *Id.* at n.20 (emphasis added).

While *Weaver* did not hold that a diminution in the opportunity for obtaining discretionary good time was not a violation of *ex post facto*, it certainly does not support a holding that it was, particularly when viewed through the more narrow focus of *Collins*. Yet, the Supreme Court of Illinois relied on *Weaver* for just that proposition. pp. App. 3-6. Without fully appreciating the implications of *Collins*, it stated that in *Weaver* this Court used "an expansive interpretation of the *ex post facto* clause" based upon the "detriment" language. p. App. 3. Applying the "expansive interpretation" it perceived in *Weaver*, the court found retrospective loss of any possibility for earlier release violated *ex post facto* prohibitions without considering that the type of early release credits at issue before it were very different than the type of credits at issue in *Weaver*. p. App. 4, citing *Weaver*, 450 U.S. at 33-34.

In contrast to the Illinois Supreme Court's interpretation of *Weaver*, the Eleventh Circuit in *Hock* cited to *Weaver* for the proposition that "[t]he Ex Post Facto Clause operates not to protect an individual's right to less punishment, but rather as a means of assuring that an individual will receive fair warning of criminal statutes and punishment." 41 F.3d at 1471-72. This is, indeed, one of the two purposes of the *ex post facto* clause recited in *Weaver*, the other being to restrain arbitrary and vindictive legislation. 450 U.S. at 28-29.

The Illinois legislation here in issue can not be characterized as arbitrary, vindictive, or even punitive. *See* Transcript of the Illinois Senate Debate, 88th General Assembly, April 16, 1993, (First Proof) at pp. App. 31-40. Because of

the many contingencies in obtaining educational early release credits under the pre-existing Illinois program, retrospective application of the amendment narrowing the applicability of that program also does not interfere with fair warning. Because the legislation in issue does not impair either purpose of the *ex post facto* clause, the decision of the Supreme Court of Illinois should be reversed.

CONCLUSION

For these reasons, Odie Washington respectfully asks this Court to issue a writ of certiorari to review the opinion and judgment of the Supreme Court of Illinois.

Respectfully submitted,

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App. 1

[Filed December 22, 1994]

IN THE
SUPREME COURT OF ILLINOIS

Docket No. 76945—Agenda 27—September 1994.
MICHAEL BARGER *et al.*, Appellees, v.
HOWARD PETERS III, Director of Corrections, Appellant.

JUSTICE FREEMAN delivered the opinion of the court:

The question in this case is whether Public Act 88-311, which excludes inmates from the opportunity to increase good-conduct credit, violates the *ex post facto* clauses of the Federal and Illinois Constitutions (U.S. Const., art. I, §10; Ill. Const. 1970, art. I, §16). We hold that it does.

BACKGROUND

As of September 10, 1990, section 3-6-3 of the Unified Code of Corrections applied a multiplier to increase the "day for a day" credit certain prisoners could earn toward early release. (Ill. Rev. Stat. 1991, ch. 38, par. 1003-6-3 (amended by Pub. Act 86-1373, eff. September 10, 1990).) Inmates engaged in Department of Corrections educational programs who met specified goals were eligible to receive credit increased by a factor of 1.25. (Ill. Rev. Stat. 1991, ch. 38, par. 1003-6-3.) The multiplier was not available for those convicted of first or second degree murder or those convicted of a Class X felony. (Ill. Rev. Stat. 1991, ch. 38, par. 1003-6-3.) Nor was it available for inmates who were convicted of a felony while engaged in the programs. Ill. Rev. Stat. 1991, ch. 38, par. 1003-6-3.

Public Act 88-311, effective August 11, 1993, amended section 3-6-3. (Pub. Act 88-311, eff. August 11, 1993 (amend-

ing Ill. Rev. Stat. 1991, ch. 38, par. 1003-6-3).) Among the changes, the act precluded application of the multiplier to categories of inmates previously eligible for it under section 3-6-3. (Pub. Act 88-311, eff. August 11, 1993 (amending Ill. Rev. Stat. 1991, ch. 38, par. 1003-6-3).) Pertinent here, the act rendered ineligible for the multiplier inmates convicted of criminal sexual assault, felony criminal sexual abuse, and aggravated criminal sexual abuse, and aggravated battery with a firearm, as well as related inchoate offenses. Pub. Act 88-311, eff. August 11, 1993 (amending Ill. Rev. Stat. 1991, ch. 38, par. 1003-6-3).

Pursuant to a certified class action, the circuit court of Cook County ruled that Public Act 88-311 violates *ex post facto* prohibitions. The suit had been brought by Michael Barger and Richard Maez, convicted, respectively, of criminal sexual assault and attempted armed robbery. Barger and Maez represented inmates whose crimes and convictions fell between September 10, 1990, the effective date of Public Act 86-1373, and August 11, 1993, the effective date of Public Act 88-311, making them ineligible for increased credit. Finding Public Act 88-311 unconstitutional, the circuit court permanently enjoined the Department of Corrections from applying it to the plaintiff class.

The matter lies here on direct appeal (134 Ill. 2d R. 302).

DISCUSSION

The Federal Constitution prohibits States from enacting any *ex post facto* law. (U.S. Const., art. I, §10.) Although that limitation renders it unnecessary, the same protection historically has been included in this State's constitutions. (Ill. Const. 1970, art. I, §16; Ill. Const. 1870, art. II, §14; Ill. Const. 1848, art. XIII, §17; Ill. Const. 1818, art. VIII, §16; F. Grad, *The State Bill of Rights*, in Con-

Con, Issues for the Illinois Constitutional Convention 44 (V. Ranney ed. 1970); G. Braden & R. Cohn, The Illinois Constitution: An Annotated and Comparative Analysis 75 (1969).) It has been suggested that there is, nevertheless, some utility in the provisions' coexistence, the thought being that the prohibitions, together, lend greater assurance of the constitutional protection than the Federal clause alone. G. Braden & R. Cohn, The Illinois Constitution: An Annotated and Comparative Analysis 75 (1969).

But the drafters of our modern constitution intended the Illinois *ex post facto* clause to do no more than conform to the Federal Constitution's general prohibition on the States. (3 Record of Proceedings, Sixth Illinois Constitutional Convention 1476; 6 Committee Proposals, Sixth Illinois Constitutional Convention 55.) Thus, in construing this State's constitutional provision, we are without a basis to depart from the Supreme Court's construction of the Federal *ex post facto* clause. (See *People v. Tisler* (1984), 103 Ill. 2d 226, 243-45.) And, in fact, this court has long interpreted our own constitutional provision in step with Supreme Court pronouncements. See, *e.g.*, *People v. Ramey* (1992), 152 Ill. 2d 41, 63-64.

In *Weaver v. Graham* (1981), 450 U.S. 24, 67 L. Ed. 2d 17, 101 S. Ct. 960, the Supreme Court used an expansive interpretation of the *ex post facto* clause to strike down a Florida statute which reduced "gain-time" credit earned for avoiding disciplinary infractions and performing assigned tasks. Such legislation, the Court explained, could be constitutionally applied retrospectively only if it did not work to a prisoner's "detriment." (*Weaver*, 450 U.S. at 33, 67 L. Ed. 2d at 25, 101 S. Ct. at 966.) Because the statute "change[d] 'the quantum of punishment' " for prisoners who committed crimes before its enactment, it was disadvantageous with respect to them. (*Weaver*, 450

U.S. at 33, 67 L. Ed. 2d at 25, 101 S. Ct. at 966, quoting *Dobbert v. Florida* (1977), 432 U.S. 282, 293-94, 53 L. Ed. 2d 344, 356, 97 S. Ct. 2290, 2298.) The disadvantage: constricting the opportunity to earn early release effectively "lengthen[ed]" the period of actual incarceration, making more onerous the punishment for already committed crimes. *Weaver*, 450 U.S. at 33-34, 67 L. Ed. 2d at 26, 101 S. Ct. at 966-67.

This court, in *Tiller v. Klincar* (1990), 138 Ill. 2d 1, used the same interpretation of the *ex post facto* prohibition to invalidate legislation curtailing the frequency of parole hearings which had been previously mandated every year. The "possibility of parole," the court noted, "is an element of the punishment annexed to any crime." (*Tiller*, 138 Ill. 2d at 11.) Thus, in lengthening the period between parole hearings, the legislation eliminated the opportunity for earlier release to the disadvantage of those already incarcerated. *Tiller*, 138 Ill. 2d at 11-12.

The notion that the *ex post facto* prohibition nullifies any law which " 'alters the situation of a party to his disadvantage' " (emphasis omitted) was established in *Kring v. Missouri* (1883), 107 U.S. 221, 228-29, 27 L. Ed. 506, 509, 2 S. Ct. 443, 449, quoting *United States v. Hall* (D. Pa. 1809), 26 F. Cas. 84, 86 (No. 15,285). But, in *Collins v. Youngblood* (1990), 497 U.S. 37, 48-49, 111 L. Ed. 2d 30, 42-43, 110 S. Ct. 2715, 2722, the Supreme Court overruled *Kring*, holding that the quoted language indicated an unjustified expansion of the *ex post facto* prohibition beyond the categories of laws the Framers intended to come within the clause's ambit.

Those categories were established in *Calder v. Bull* (1798), 3 U.S. (3 Dall.) 386, 1 L. Ed. 648, shortly after ratification of the Constitution. They included, as is relevant here, "[e]very law that *changes the punishment*, and

inflicts a *greater punishment*, than the law annexed to the crime, when committed." (Emphasis in original.) (*Calder*, 3 U.S. (3 Dall.) at 390, 1 L. Ed. 650.) Summarized differently, such a law would be one "which makes more burdensome the punishment for a crime[ ] after its commission." (*Beazell v. Ohio* (1925), 269 U.S. 167, 169-70, 70 L. Ed. 216, 217, 46 S. Ct. 68, 68.) If the law does not so affect the punishment associated with a crime, it is of no moment that the law may work to a prisoner's disadvantage. See *Collins*, 497 U.S. at 48, 111 L. Ed. 2d at 42-43, 110 S. Ct. at 2722.

The question here then becomes whether elimination of an opportunity to increase good-conduct credit is a change in the punishment associated with a crime or results in the infliction of greater punishment. In the wake of *Collins*, that question is not to be answered against what disadvantage may be visited upon the plaintiff class through elimination of the opportunity for early release. But because *Collins* otherwise left unaffected the Court's holding in *Weaver* and, by implication, this court's decision in *Tiller*, the question ultimately turns on the meaning the Court ascribes to the term "punishment."

The Supreme Court does not view punishment for *ex post facto* clause purposes to mean simply the period of incarceration prescribed by a judge for a person convicted of a crime—that is, the sentence. Instead, the Court construes punishment to mean the actual time that such a person spends in prison. The Florida statute invalidated in *Weaver* did not affect, retrospectively, the sentence imposed on any inmate. The " 'quantum of punishment' " affected was nothing but the time for which an inmate was actually incarcerated under the sentence imposed. Generally, then, any legislation curtailing the possibility of reducing actual prison time makes more onerous the

consequence associated with a crime. It is entirely inconsequential that capitalizing on the opportunity may depend on an inmate's success in staying out of trouble or attaining other goals.

Public Act 88-311 does not change the prescribed period of incarceration imposed for the crimes committed by members of the plaintiff class. If understanding the consequence associated with a crime was limited by the more common notion of equating punishment with sentence, the act would comport with the constitutional clauses. But when the consequence associated with a crime is viewed in the manner indicated by the Supreme Court in *Weaver*, the act does, indeed, make more burdensome the punishment associated with certain crimes already committed.

We must, as in *Tiller*, apply that more generous understanding of punishment here. Public Act 88-311 curtails the opportunity for an earlier release as permitted under section 3-6-3 in its form as existed between September 10, 1990, and August 11, 1993. Public Act 88-311 curtails the opportunity for an earlier release as permitted under section 3-6-3 in its form as existed between September 10, 1990, and August 11, 1993, and so makes more burdensome the punishment associated with the crimes of the plaintiff class. The class consists of inmates who were eligible as of September 10, 1990, to enhance their good-conduct credit by a factor of 1.25 under section 3-6-3 but who were, as of August 11, 1993, deprived of that opportunity by Public Act 88-311. As to that class, Public Act 88-311 violates the *ex post facto* prohibitions of the Federal and Illinois Constitutions.

We therefore affirm the permanent injunction entered by the circuit court. The injunction precludes application of Public Act 88-311 "to persons who committed the of-

fenses for which they were convicted on and after September 10, 1990[,] to and including August 10, 1993, were committed to the Illinois Department of Corrections, and were or would have been eligible on August 10, 1993[,] for the 1.25 enhanced educational good conduct credit" under section 3-6-3 as unamended by Public Act 88-311.

Affirmed.

JUSTICE HEIPLE, dissenting:

When the instant criminal plaintiffs were sentenced for their crimes, section 3-6-3 of the Unified Code of Corrections provided that certain prisoners were eligible to earn credits toward early release through their participation in prison educational programs. (730 ILCS 5/3-6-3(a)(4) (West 1992).) Then, in 1993, Public Act 88-311 became effective, which modified the Unified Code of Corrections so that certain categories of prisoners were no longer eligible to earn any additional education credits. The plaintiffs' resulting class action suit alleged, and the majority has found, that Public Act 88-311 constitutes an impermissible *ex post facto* law in that it makes more burdensome the punishment of their crimes. I dissent.

Prior to the Supreme Court's decision in *Collins v. Youngblood* (1990), 497 U.S. 37, 50, 111 L. Ed. 2d 30, 44, 110 S. Ct. 2715, 2723, *ex post facto* jurisprudence in the United States had devolved into finding a violation wherever a law retroactively worked a disadvantage on a prisoner. Essentially, the majority employs this outdated, broader approach in finding that Public Act 88-311 is an *ex post facto* law unconstitutionally disadvantaging the instant plaintiffs.

In *Collins*, however, the Supreme Court returned *ex post facto* jurisprudence to its rightful roots by reaffirm-

ing the definition delivered by Justice Chase in *Calder v. Bull*. (*Collins*, 497 U.S. at 50, 111 L. Ed. 2d at 44, 110 S. Ct. at 2723, citing *Calder v. Bull* (1798), 3 U.S. (Dall.) 386, 1 L. Ed. 648.) *Calder* held, in pertinent part, that an *ex post facto* violation occurs only where a retroactive law "changes the punishment, and inflicts a greater punishment, *than the law annexed to the crime, when committed.*" (Emphasis added.) *Calder*, 3 U.S. at 390, 1 L. Ed. at 650.

The majority errs in its application of the *Calder* definition by focusing solely on the meaning of the term "punishment." It finds that Public Act 88-311 inflicts a greater punishment in that it curtails the possibility of reducing the plaintiffs' actual prison time. What the majority ignores, however, is the threshold requirement that the law at issue constitute a change in the punishment "annexed to the crime, when committed." *Calder*, 3 U.S. at 390, 1 L. Ed. at 650.

The dangers inherent in ignoring this requirement become clear upon considering the absurd conclusions to which it logically leads. Consider section 3-6-3(a)(3) of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(3) (West 1992)), which gives prison officials the discretion to grant an additional 180 days of good-conduct credit for meritorious conduct. Accepting the majority's rationale, if, at the time of the crime, good-conduct credit could be earned by a prisoner for cleaning prison latrines, then the subsequent assignment of such services to an employed janitor might arguably be deemed a violation of the prisoner's rights. More directly to the point, however, the majority's approach improvidently raises both equal protection and *ex post facto* questions as to the thousands of prisoners who are currently on the waiting lists for educational programs.

At the time Public Act 88-311 was enacted, there were in excess of 4,000 prisoners on waiting lists for educational programs. (See 88th Ill. Gen. Assem., Senate Proceedings, April 16, 1993, at 1 (comments of Senator Hawkinson).) As of November 1, 1994, some 4,992 inmates remained on educational program waiting lists. Doubtless, many of these prisoners will have served their prison terms without ever being offered participation in educational programs.

It should be recognized that the amendments contained in Public Act 88-311 can only constitute an *ex post facto* law if the pre-amendment provisions constituted a law annexed to the plaintiffs' crimes when committed. In determining whether a law is annexed to a crime when committed, it is appropriate to note that, by including the *ex post facto* prohibition in the Constitution, the Framers sought to "assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." (*Weaver v. Graham* (1981), 450 U.S. 24, 28-29, 67 L. Ed. 2d 17, 23, 101 S. Ct. 960, 964.) In other words, the *ex post facto* clause ensures that a criminal knows in advance the consequences of his crime.

These consequences, of course, include the sentence that a criminal can expect under the law. In Illinois, for example, criminals understand that, except for certain proscribed offenders, the sentence imposed by a trial judge will automatically be reduced by their good behavior while in prison. (730 ILCS 5/3-6-3(a)(2) (West 1992).) Such automatic credit for good behavior is a law annexed to the crime when committed because, *inter alia*, this guaranteed "eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be im-

posed." *Weaver*, 450 U.S. at 32, 67 L. Ed. 2d at 25, 101 S. Ct. at 966.

This is not the case, however, regarding enhanced credit for participation in educational programs. Unlike automatic credit for good behavior, the possibility of earning educational credit in Illinois has always been uncertain. It depends upon the vagaries of State funding, the prison that an inmate is randomly assigned to, and even upon the innate abilities of a given prisoner.

The arbitrary and uncertain availability of the educational programs precludes any suggestion that criminals anticipate that their sentences will be reduced if they choose to participate in educational programs. For, choose though they might, their desires are likely to be frustrated by the unavailability of such programs. Consequently, unlike automatic good-conduct credit, the law making these educational programs available does not constitute a law annexed to the crime when committed.

Insofar as the availability of educational participation credits could not have been depended upon when the plaintiffs committed their crimes, Public Act 88-311, which only modifies the availability of the educational classes, is not an *ex post facto* law. Any disadvantages caused by Public Act 88-311 are thus constitutionally irrelevant.

For the foregoing reasons, I respectfully dissent from the majority opinion.

JUSTICE NICKELS joins in this dissent.

[Entered January 27, 1994]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

MICHAEL BARGER, et al.,

Plaintiffs,

v. No. 93 CH 10462

HOWARD PETERS,

Defendant.

ORDER

This cause coming to be heard on defendant's motion to dismiss, the parties having given argument and filed written responses and the Court being fully advised in the premises.

IT IS HEREBY ORDERED THAT:

1. Defendants motion to dismiss is denied;

2. Plaintiffs' motion for preliminary injunction, Allowed to be Amended to a motion for permanent injunction is granted, and defendants motion for stay pending appeal is granted;

3. Plaintiff's oral motion for judgment on the pleadings is granted.

ENTER: T. O'Brien, Judge

[Entered February 8, 1994]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MICHAEL BARGER and RICHARD MAEZ, individually and on behalf of all others similarly situated,

Plaintiffs,

v. No. 93 CH 10462

HOWARD A. PETERS, III, Director, Illinois Department of Corrections, in his official capacity,

Defendant.

ORDER

This matter having come before the Court on Plaintiff's Motion for Class Certification (pursuant to 735 ILCS § 5/2-801 (1993)); Counsel for the Parties being present; and the Court being fully advised;

IT IS HEREBY ORDERED THAT:

1. Defendant having raised no objections, the Court finds that the prerequisites for the maintenance of a class action set forth in 735 ILCS § 5/2-801—numerosity; common questions of fact or law which predominate over any questions affecting only individual class members; representative parties will fairly and adequately protect the interest of the class; and class action is an appropriate method for the fair and efficient adjudication of the case—have been met.

2. Accordingly, the Court certifies a class in this action consisting of:

All persons who: 1) committed offenses on or after September 10, 1990 to and including August 10, 1993, 2) have been or will be committed to the Illinois Department of Corrections, 3) were or would have been eligible on August 10, 1993 for the 1.25 enhanced educational good conduct credit under Pub. Act 86-1373 (730 ILCS 5/3-6-3(a)(4) (1993)), and 4) were rendered ineligible for enhanced educational good conduct credit under Pub. Act 88-311 (eff. August 11, 1993).

3. Plaintiffs are granted leave to amend their complaint so that the complaint's class description conforms to the above class description.

4. As to the named plaintiffs and members of the plaintiff class, the Court holds that Pub. Act 88-311 (eff. August 11, 1993) is unconstitutional as it applies to persons who committed the offenses for which they were convicted on and after September 10, 1990 to and including August 10, 1993, were committed to the Illinois Department of Corrections, and were or would have been eligible on August 10, 1993 for the 1.25 enhanced educational good conduct credit under Pub. Act 86-1373, for the reason that such application violates the *ex post facto* prohibitions of the United States (art. I, § 10) and Illinois (art. I, § 16) Constitutions.

5. The Court's permanent injunction, entered and stayed, pending appeal by defendant, on January 27, 1994, extends to the named plaintiffs and members of the plaintiff class as follows:

Defendant Peters is permanently enjoined from:

a) applying Pub. Act 88-311 (eff. Aug. 11, 1993) (1993 Ill. Leg. Serv. 2605) ("1993 Law") and the Rules defendant Peters promulgated thereunder—20 Ill. Admin. Code §§ 107.145 and 107.520 (eff. Sept. 17, 1993)—to the named plaintiffs and members of the

plaintiff class who: (i) were or would have been eligible to earn 1.25 enhanced educational good conduct credit pursuant to 730 ILCS 5/3-6-3(a)(4) (1993) (Pub. Act 86-1373, eff. Sept. 10, 1990, 1990 Ill. Laws 2844-46 (West)) ("1990 Law") and (ii) have been rendered ineligible to earn 1.25 enhanced educational good conduct credit pursuant to the 1993 Law;

b) failing to award enhanced educational good conduct credit to the named plaintiffs and members of the plaintiff class who: (i) were or would have been eligible to earn the 1.25 enhanced educational good conduct credit pursuant to the 1990 Law and (ii) have been rendered ineligible to earn the 1.25 enhanced educational good conduct credit pursuant to the 1990 Law; and

c) failing to release the named plaintiffs and class members on the date on which they would be released if awarded the 1.25 enhanced educational good conduct credit pursuant to the 1990 Law.

6. The issue of attorney's fees and costs is reserved. Plaintiffs are granted 28 days in which to file their motion.

7. This Order is a final and appealable Order. The Court expressly finds that there is no just cause for delay of enforcement or appeal of this Order or its Order of January 27, 1994.

ENTERED Thomas J. O'Brien, Judge, 1994

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES
Art. 1, §10

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

CONSTITUTION OF THE STATE OF ILLINOIS
Art. I, §16

§ 16. Ex Post Facto Laws and Impairing Contracts

No ex post facto law, or law impairing the obligation of contracts or making an irrevocable grant of special privileges or immunities, shall be passed.

PUBLIC ACT 88-311
(Senate Bill No. 956)

AN ACT in relation to criminal law, amending named Acts.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

* * * * *

Section 15. The Unified Code of Corrections is amended by changing Sections 3-2-2, 3-6-3, 5-8-1, 5-8-1.1, 5-8A-2, and 5-8A-3 as follows:

* * * * *

(730 ILCS 5/3-6-3) (from Ch. 38, par. 1003-6-3)
Sec. 3-6-3. Rules and Regulations for Early Release.

(a)(1) The Department of Corrections shall prescribe rules and regulations for the early release on account of good conduct of persons committed to the Department which shall be subject to review by the Prisoner Review Board.

(2) Such rules and regulations shall provide that the prisoner shall receive one day of good conduct credit for each day of service in prison other than where a sentence of "natural life" has been imposed. Each day of good conduct credit shall reduce by one day the inmate's period of incarceration set by the court.

(3) Such rules and regulations shall also provide that the Director may award up to 180 days additional good conduct credit for meritorious service in specific instances as the Director deems proper; except that the additional 90 days of good conduct credit for meritorious service provided by this amendatory Act of 1990 shall not be awarded to any prisoner who is serving a sentence for conviction of first degree murder, reckless homicide while under the influence of alcohol or any other drug, aggravated kidnapping, kidnapping, aggravated criminal sexual assault, criminal sexual assault, deviate sexual assault, aggravated criminal sexual abuse, aggravated indecent liberties with a child, indecent liberties with a child, child pornography, heinous battery, aggravated battery of a

spouse, aggravated battery of a spouse with a firearm, aggravated battery of a child, endangering the life or health of a child, cruelty to a child, or narcotic racketeering.

(4) Such rules and regulations shall also provide that the good conduct credit accumulated and retained under paragraph (2) of subsection (a) of this Section by any inmate during specific periods of time in which such inmate is engaged full-time in substance abuse programs, correctional industry assignments, or educational programs provided by the Department under this paragraph (4) and satisfactorily completes the assigned program as determined by the standards of the Department, shall be multiplied by a factor of 1.25 for program participation before the effective date of this amendatory Act of 1993 and 1.50 for program participation on or after that date. However, no inmate shall be eligible for the additional good conduct credit under this paragraph (4) while assigned to a boot camp, mental health unit, or electronic detention, or if convicted of first degree murder, a Class X felony, criminal sexual assault, felony criminal sexual abuse, aggravated criminal sexual abuse, aggravated battery with a firearm, or any predecessor or successor offenses with the same or substantially the same elements, or any inchoate offenses relating to the foregoing offenses. No inmate shall be eligible for the additional good conduct credit under this paragraph (4) who (i) has previously received increased good conduct credit under this paragraph (4) and has subsequently been convicted of a felony, or (ii) has previously served more than one prior sentence of imprisonment for a felony in an adult correctional facility.

Educational, vocational, substance abuse and correctional industry programs under which good conduct credit may be increased under this paragraph (4) shall be evaluated by the Department on the basis of documented standards. The Department shall report the results of these evaluations to the Governor and the General Assembly by September 30th of each year. The reports shall include data relating to the recidivism rate among program participants.

Availability of such programs shall be subject to the limits of fiscal resources appropriated by the General Assembly for such purpose. Eligible inmates who are denied immediate admission shall be placed on a waiting list under criteria established by the Department. The inability of any inmate to become engaged in any such programs by reason of insufficient program resources or for any other reason established under the rules and regulations of the Department shall not be deemed a cause of action under which the Department or any employee or agent of the Department shall be liable for damages to the inmate.

(5) Whenever the Department is to release any inmate earlier than it otherwise would because of a grant of good conduct credit for meritorious service given at any time during the term, the Department shall give reasonable advance notice of such impending release to the State's attorney of the county where the prosecution of the inmate took place.

(b) Whenever a person is or has been committed under several convictions, with separate sentences, such sentences shall be construed under Section 5-8-4 in granting and forfeiting of good time.

(c) The Department shall prescribe rules and regulations for revoking good conduct credit, or suspending or reducing the rate of accumulation thereof for specific rule violations, during imprisonment. Such rules and regulations shall provide that:

(1) Good conduct credits previously earned shall accumulate on a monthly basis.

(2) No inmate may be penalized more than one year of good conduct credit for any one infraction.

When the Department seeks to revoke, suspend or reduce the rate of accumulation of any good conduct credits for an alleged infraction of its rules, it shall bring charges therefor against the prisoner sought to be so deprived of good conduct credits before the Prisoner Review Board

as provided in subparagraph (a)(4) of Section 3-3-2 of this Code, if the amount of credit at issue exceeds 30 days or when during any 12 month period, the cumulative amount of credit revoked exceeds 30 days except where the infraction is committed or discovered within 60 days of scheduled release. In such cases, the Department of Corrections may revoke up to 30 days of good conduct credit. The Board may subsequently approve the revocation of additional good conduct credit, if the Department seeks to revoke good conduct credit in excess of thirty days. However, the Board shall not be empowered to review the Department's decision with respect to the loss of 30 days of good conduct credit within any calendar year for any prisoner or to increase any penalty beyond the length requested by the Department.

The Director of the Department of Corrections, in appropriate cases, may restore up to 30 days good conduct credits which have been revoked, suspended or reduced. Any restoration of good conduct credits in excess of 30 days shall be subject to review by the Prisoner Review Board. However, the Board may not restore good conduct credit in excess of the amount requested by the Director.

Nothing contained in this Section shall prohibit the Prisoner Review Board from ordering, pursuant to Section 3-3-9(a)(3)(i)(B), that a prisoner serve up to one year of the sentence imposed by the court which was not served due to the accumulation of good conduct credit.

(Source: P.A. 86-1090; 86-1373; 87-435.)

* * * * *

Section 99. This Act takes effect upon becoming law.
Passed in the General Assembly July 12, 1993.
Approved August 11, 1993.
Effective August 11, 1993.

1993 Ill. Laws 2604-19

PUBLIC ACT 86-1373
(House Bill No. 3167)

AN ACT to amend the Unified Code of Corrections by changing Section 3-6-3.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. The Unified Code of Corrections is amended by changing Section 3-6-3 as follows:

(Ch. 38, par. 1003-6-3)

Sec. 3-6-3. Rules and Regulations for Early Release.) (a)(1) The Department of Corrections shall prescribe rules and regulations for the early release on account of good conduct of persons committed to the Department which shall be subject to review by the Prisoner Review Board.

(2) Such rules and regulations shall provide that the prisoner shall receive one day of good conduct credit for each day of service in prison other than where a sentence of "natural life" has been imposed. Each day of good conduct credit shall reduce by one day the inmate's period of incarceration set by the court.

(3) Such rules and regulations shall also provide that the Director may award up to 90 days additional good conduct credit for meritorious service in specific instances as the Director deems proper.

(4) Such rules and regulations shall also provide that the good conduct credit accumulated and retained under paragraph (2) of subsection (a) of this Section by any inmate during specific periods of time in which such inmate is engaged full-time in educational programs provided by the Department under this paragraph (4) and achieves a goal of improved literacy or has satisfactorily completed other academic or vocational training programs provided by the Department as determined by the standards of the Department of Corrections School District, shall be multiplied by a factor of 1.25. However, no inmate shall be eligible for the additional good conduct credit under this paragraph (4), if convicted of first degree murder, second degree murder, or a Class X felony. No inmate shall be

eligible for the additional good conduct credit under this paragraph (4) if such inmate has engaged in the educational, academic or vocational training programs provided by the Department under this paragraph (4) and has subsequently been convicted of a felony. Educational programs under which good conduct credit may be increased through the achievement of academic goals shall be provided by the Department on the basis of documented professional standards and shall be made available to any inmate seeking admission to such programs within the limits of fiscal resources appropriated by the General Assembly for such purpose. Eligible inmates who are denied immediate admission shall be placed on a waiting list under criteria established by the Department. The inability of any inmate to become engaged in any such educational program by reason of insufficient program resources or for any other reason established under the rules and regulations of the Department shall not be deemed a cause of action under which the Department or any employee or agent of the Department shall be liable for damages to the inmate.

(5) Whenever the Department is to release any inmate earlier than it otherwise would because of a grant of good conduct credit for meritorious service given at any time during the term, the Department shall give reasonable advance notice of such impending release to the State's attorney of the county where the prosecution of the inmate took place.

(b) Whenever a person is or has been committed under several convictions, with separate sentences, such sentences shall be construed under Section 5-8-4 in granting and forfeiting of good time.

(c) The Department shall prescribe rules and regulations for revoking good conduct credit, or suspending or reducing the rate of accumulation thereof for specific rule violations, during imprisonment. Such rules and regulations shall provide that:

(1) good conduct credits previously earned shall accumulate on a monthly basis.

(2) no inmate may be penalized more than one year of good conduct credit for any one infraction.

When the Department seeks to revoke, suspend or reduce the rate of accumulation of any good conduct credits for an alleged infraction of its rules, it shall bring charges therefor against the prisoner sought to be so deprived of good conduct credits before the Prisoner Review Board as provided in subparagraph (a)(4) of Section 3-3-2 of this Code, if the amount of credit at issue exceeds 30 days or when during any 12 month period, the cumulative amount of credit revoked exceeds 30 days except where the infraction is committed or discovered within 60 days of scheduled release. In such cases, the Department of Corrections may revoke up to 30 days of good conduct credit. The Board may subsequently approve the revocation of additional good conduct credit, if the Department seeks to revoke good conduct credit in excess of thirty days. However, the Board shall not be empowered to review the Department's decision with respect to the loss of 30 days of good conduct credit within any calendar year for any prisoner or to increase any penalty beyond the length requested by the Department.

(3) The Director of the Department of Corrections, in appropriate cases, may restore up to 30 days good conduct credits which have been revoked, suspended or reduced. Any restoration of good conduct credits in excess of 30 days shall be subject to review by the Prisoner Review Board. However, the Board may not restore good conduct credit in excess of the amount requested by the Director.

(4) Nothing contained in this Section shall prohibit the Prisoner Review Board from ordering, pursuant to Section 3-3-9(a)(3)(i)(B), that a prisoner serve up to one year of the sentence imposed by the court which was not served due to the accumulation of good conduct credit.

(Source: P.A. 83-1362.)

Section 2. This Act takes effect upon becoming law.
Passed in the General Assembly June 26, 1990.
Approved September 10, 1990.
Effective September 10, 1990.

1990 Ill. Laws 2844-45

ILLINOIS REGISTER
DEPARTMENT OF CORRECTIONS
NOTICE OF ADOPTED AMENDMENT

Section 107.145 Educational Good Conduct Credits

Committed persons who are enrolled in full-time vocational or academic educational programs approved by the Department may be eligible to receive educational good conduct credits in addition to good conduct credits awarded in accordance with this Part. Educational good conduct credits shall be awarded at the rate of .25 days for each day during which educational goals have been achieved in accordance with 20 Ill. Adm. Code 405.

(Source: Added at 15 Ill. Reg. 5638, effective April 15, 1991)

15 Ill. Reg. 5641

Section 405.20 Adult and Juvenile
Educational Programs

a) The opportunity for educational programs shall be available in the Adult and Juvenile Divisions through the Department of Corrections School District #428. Nothing in this Part shall be construed to require educational opportunities for all committed persons.

1) Adult Division educational programs shall include:

A) Adult basic education and General Educational Development (G.E.D.) training;

B) Special education;

C) Vocational education and career counseling; and

D) Post-secondary education where possible.

2) Juvenile Division educational programs shall include:

A) Basic education and G.E.D.;

B) High school credits;

C) Special education;

D) Vocational education; and

E) Post-secondary education where possible.

b) Committed persons shall, upon request, be considered for enrollment in an educational program for which they are eligible or placement on the waiting list for the program if one exists. Waiting lists shall be maintained in chronological order.

c) In determining eligibility for enrollment in educational programs the Department shall consider, among other factors, the committed person's composite scores on achievement tests, the safety and security of the facility or any person, staff recommendations, requirements for admission to specific programs, administrative concerns, and the committed person's institutional behavior, disciplinary record, educational record, projected release date, and medical and mental health status.

d) In the Adult Division, committed persons may be eligible to enroll in:

1) Adult Basic Education if they test below the 6.0 grade level.

2) G.E.D. training if they test at the 6.0 grade level or above and they do not have a verified GED certificate or a High School diploma.

3) Special education regardless of test scores.

4) School District #428 vocational education regardless of test scores.

5) College vocational programs if they test at the 6.0 grade level or above and the college policy permits admission.

6) Two-year college degree academic programs if they have a verified GED certificate or High School diploma.

7) Four-year college degree academic programs if they have a verified GED certificate or High School diploma, and they have 30 hours of college transfer credit.

e) In the Juvenile Division, committed persons may be eligible to enroll in:

1) Basic Education if they test below the 6.0 grade level.

2) G.E.D. Training if they test at the 6.0 grade level or above and they do not have a verified GED certificate or High School diploma.

3) High School credits if they test at the 6.0 grade level or above and they do not have a verified GED certificate or High School diploma.

4) Special Education regardless of test scores.

5) School District #428 vocational education if they test at the 3.0 grade level or above.

6) College vocational programs if they test at the 6.0 grade level or above and the college policy permits admission.

7) Two-year college academic programs if they have a verified GED certificate or High School diploma.

f) Committed persons shall be required to attend and actively participate in classes for which they are enrolled and shall be subject to discipline under 20 Ill. Adm. Code 504, unless absent due to verified illnesses, approved visits, court writs, furloughs, discipline, lockdowns, and other reasons approved by the Chief Administrative Officer. Active participation shall mean, but shall not be limited to, instances in which the committed person is attentive, responsive, and cooperative and completes assigned work.

g) Committed persons shall adhere to attendance requirements of the educational program in which they are enrolled:

1) Committed persons enrolled in non-college academic programs in the Adult and Juvenile Divisions shall be required to attend and to actively participate in the number of instructional days specified to complete the program and shall not be absent from the program or shall not be documented as not actively participating in the program for more than 30 instructional days, not including days absent due to lockdowns.

2) Persons committed in the Community Services Division and committed persons enrolled in college academic courses shall attend scheduled classes and shall not be absent more than allowed under the requirements of the educational provider or the correctional facility policy. Committed persons shall be advised of the specific requirements of the program in which they are enrolled.

h) Committed persons may be removed from educational programs due to:

1) Disciplinary action.

2) Failure to adhere to attendance requirements.

3) Administrative reasons approved by the Educational Administrator or the Chief Administrative Officer including, but not limited to, disruptive behavior, lack of active participation, termination or suspension of the program, and safety and security reasons.

4) The committed person's transfer to another facility or program.

(Source: Amended at 15 Ill. Reg. 5642, effective April 15, 1991)

15 Ill. Reg. 5646-49

Section 405.55 Educational Good Conduct Credits

a) Committed persons who enroll full-time in an academic or vocational education program approved by the Department shall be eligible to receive educational good conduct credits provided:

1) They are eligible to receive good time in accordance with 20 Ill. Adm. Code 107, Subpart B;

2) They have not been convicted of first degree murder, second degree murder, or a Class X felony;

3) They have not been convicted of a felony which was committed after a previous award of educational good conduct credits; and

4) They achieve the educational goals established by the Department within a specified time period.

b) Goals shall be established in writing for committed persons who are eligible to receive educational good conduct credits and shall be signed by the committed person. The goal statement shall include the goal period, attendance requirements, and the educational goals the committed person is expected to achieve.

c) The goal period for persons committed in the Adult and Juvenile Divisions who are enrolled in any program except college academic programs shall be 90 instructional days of attendance or the number of instructional days of attendance required to complete the program if less than 90 instructional days.

d) The goal period for persons committed in the Adult and Juvenile Divisions who are enrolled in college academic programs and for persons committed in the Community Services Division shall be the period of time during which the classes are scheduled.

e) Educational goals shall be determined based on the committed person's current level of achievement and ability. Educational goals may include, but not be limited to, one or more of the following factors:

1) Achievement of a specified grade level;

2) Attainment of a GED certificate;

3) Attainment of a specific number of high school or college credits;

4) Achievement of specified skills; and/or

5) Maintaining a grade of "C" or better in each class or maintaining a passing grade where a pass/fail grading system is used.

f) Educational goals may, with the approval of the Educational Administrator or the Chief Administrative Officer, be revised in writing and signed by the committed person if it is determined that the original educational goals need to be revised based, among other matters, on a reassessment of the committed person's level of competency or ability. However, the goal period may not be changed.

g) When a committed person completes the educational program early, the goal period shall be revised to the date of completion and the committed person shall be eligible to receive educational good conduct credits for the revised goal period.

h) Committed persons may be removed from the educational program in accordance with Section 405.20(h).

1) If the committed person is removed from the educational program due to placement in protective custody, non-voluntary transfers for other than disciplinary reasons, termination or suspension of the educational program by the Department, release on parole or mandatory supervised release, or other reasons approved by the Chief Administrative Officer, the goal period may be revised to the date removed from the program. In determining whether to revise a goal period, the Department shall consider, among other factors, the committed person's medical and mental health status, protection needs, projected

release date, and time in the program. The committed person may be eligible to receive educational good conduct credits for the revised goal period provided satisfactory progress has been made towards achieving stated goals.

2) If the committed person is removed from the educational program prior to program completion due to reasons other than those stated in subsection (h)(1) of this Section, the committed person shall not receive any educational good conduct credit for participation in the educational program.

i) Within 15 working days, whenever feasible, of completion of the goal period or removal from the program, the Educational Administrator or Chief Administrative Officer shall:

1) Determine whether or not the committed person achieved the stated educational goals, complied with attendance requirements, or was making satisfactory progress toward achieving such goals in accordance with subsection (h)(1) of this Section.

2) Document the number of days, if any, for which the committed person is eligible to receive educational good conduct credits. This shall be the number of calendar days during the goal period, less days absent and days not attended due to lockdowns or class cancellations.

3) Document the reasons for ineligibility for award of educational good conduct credits.

4) Ensure educational good conduct credits are computed at the rate of .25 of the number of days eligible for such award.

j) The award of educational good conduct credits shall be subject to the review and approval of the Director. A copy of the award of educational good conduct credits shall be filed in the committed person's master record file.

k) Committed persons shall be advised in writing of the award of educational good conduct credits or the reasons for ineligibility of the award.

l) Committed persons may grieve the establishment of goals or the decision not to award educational good conduct credits under 20 Ill. Adm. Code 504, Subpart F.

m) New goal periods and goals shall be established upon re-enrollment.

(Source: Added at 15 Ill. Reg. 5642, effective April 15, 1991)

15 Ill. Reg. 5651-54

Section 405.70 Suspension of Programs

Unless otherwise provided by law, any of the provisions of this Part may be suspended by the Director for reasons including, but not limited to, safety and security, budgetary constraints, insufficient program resources, inadequate space or unavailability of educational staff.

(Source: Amended at 15 Ill. Reg. 5642, effective April 15, 1991)

15 Ill. Reg. 5655

STATE OF ILLINOIS
88TH GENERAL ASSEMBLY
REGULAR SESSION
SENATE TRANSCRIPT

FIRST PROOF

35th Legislative Day April 16, 1993

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Hawkinson? Read the bill, Madam Secretary. 956.

ACTING SECRETARY HAWKER:

Senate Bill 956.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Hawkinson.

SENATOR HAWKINSON.

Thank you, Mr. President. This is the Senate Judiciary Committee bill encompassing some of the recommendations of the Governor's Task Force on Crime and Corrections. It was my privilege, along with Senator Tom Dunn to serve on that commission under the leadership of former U.S. Attorney Anton Valukas, represented by law enforcement officers and a board spectrum of—of corrections and community folks. Unless something is done, our prison capacity, including our recently opened prison and the boot camps, will be at the total maximum and prisoners would have to start being released in July of 1994. This report contains many of the recommendations

of that Task Force, but not all of them. Some of the most important ones are not included here. Building a super max prison, which will enable us to control the most dangerous criminals and remove them from the ordinary prison system, is not in here. About six years ago, this Body passed a Community Corrections Act, which would allow our—our courts the full broad range of—of sentences, but we only funded it for a quarter of a year. One of the best recommendations of the Task Force is that that be fully funded so that the early offenders and young offenders can be dealt with before they reach prison stage. We also recommend some bed expansion and construction in East St. Louis. But none of those things are in this bill. This—this bill deals with a few of the recommendations. It expands the impact incarceration, or the boot camp eligibility. It expands the earned time. It does not include the worst of our offenders. Although the recommendation was to include some Class X, this bill does not include Class X offenders for the increased earned time. We have a waiting list of some four thousand inmates who are currently eligible, under our current laws, for your educational programs, but they're not able to get in because we're not funding. And although it's not in this bill, it's recommended that we spend an additional seven million dollars this year to expand those programs, because the evidence has shown from this State and other states that, first of all, some forty percent of our inmates are recidivists. That means they've been in before. They get out, and within a short time, they're back in again. But the—and that—those folks really constitute a menace to our citizens. The evidence has shown that if, while in prison, they get a degree, they get some education, they learn a skill through correctional industries or they get drug and alcohol treatment, that they tend not to recidivate at as high a rate. And if we can keep those folks from

getting back into crime when they get out, that is helpful. Because we have a waiting list of four thousand, I considered, and the Judiciary Committee did not expand the list of eligibles to include Class X, and I'm opposed to including those; but, for those who do qualify, I think we ought to have the programs available, and we ought to cut back on recidivism. I'd be happy to answer any questions; otherwise, I would strongly urge the adoption of Senate Bill 956.

PRESIDING OFFICER: (SENATOR WEAVER)

Is there discussion? Senator Cullerton.

SENATOR CULLERTON:

Yes. I also rise in support of the bill. As Senator Hawkinson has pointed out, we are very close to having the federal courts run our prison system. That is, by the way, the case in Cook County. I don't know if people realize that, but in Cook County, the Cook County jail is run by a federal judge. And when judges set bonds, some bureaucrat might release that person out into the streets, even though a judge set a bond and that person didn't make bond. That's because there's just not enough beds. We are—unless we do something about it, are going—are going to come to that point here in the—in the State. Now this bill, and these recommendations, are going to cost some money. It's going to be about seven or eight million dollars, and I would hope that when we do the budget, that we do certainly include that money, because in the long run, it's going to be saving money. There's probably about seventy-five hundred inmates that, as a result of this bill, will be—not have to go into the overcrowded prisons, but rather, their incarceration might be in a boot camp or with other type of restraints, other than having to send them to—to jail. So it's important that we

do this, and it's important that we understand, every time we keep on raising penalties, that we have to—there's a cost associated with that. Unless we're willing to pay that cost, we're going to end up having—turning over our—our prison system to some federal judge. So I think it's a—it's—it was a very fine effort on behalf of the members of the Task Force. We ought to support the bill, but keep in mind that it might cost some money.

PRESIDING OFFICER: (SENATOR WEAVER)

Senator del Valle. Senator del Valle?

SENATOR dEL VALLE:

Thank you, Mr. President. Senator Hawkinson, I commend the Task Force. I think many of the recommendations are certainly long overdue, but I'm concened about how we're going to generate the additional funds to be able to—to provide enough opportunities for people to participate in the educational programs and in the substance abuse program. This bill increases the weighted good time for individuals who participate. But my understanding is, for example, in the prison industries program, that there are about eighteen hundred participants in that program. Is that correct?

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Hawkinson.

SENATOR HAWKINSON:

Yes. Do you want me to answer your question now, or do you have more of it before I go on?

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Hawkinson.

SENATOR HAWKINSON:

I think the Senator raises a—a extremely important point. First, technically, this bill does not mandate the inclusion unless the funds are available. But Senator Cullerton touched on that this is going to cost money; it's going to cost some seven or eight million dollars in this year to expand these programs. The alternatives, however, are much more expensive. To build each prison is a fifty-five-/sixty-million-dollar proposition to house some nine hundred inmates. Now, we're going to have to build some more, but we can't build our way out of it completely. If we increase the educational programs, the drug abuse programs, the correctional industries programs, which was at issue in another bill yesterday, but something the Task Force feels that we desperately need to do, so—we can give jobs to some of these people on the outside. And the reason we do that is so that they will not prey upon our citizens and create new victims of crimes once they get out and, therefore, have to be returned to prison. But this will not be inexpensive. I mentioned in my opening remarks that we desperately need to fund the community corrections program. That will be expensive; it will take dollars. This is not cheap, but there is no cheap answer to the problem of crime in Illinois or crime in America. We have to either put the money in—in ever-expanding prisons—and I favor building them as we need them, and I've supported them in the past. But we need to put them in programs, and we're going to have to face up to that. Now, this bill doesn't contain the funding. That'll have to come in the budget, Senator, but I will support that funding because we have to do it in order to deal with the problem—to deal with the problem of crime in Illinois.

PRESIDING OFFICER: (SENATOR WATSON)

Senator del Valle.

SENATOR dEL VALLE:

Again, for—for clarification. Your projection is that an additional eight—seven to eight million dollars will be needed to expand the education, substance abuse programs and for electronic detention and the boot camp programs. A total of seven to eight million dollars for all these areas will be needed?

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Hawkinson.

SENATOR HAWKINSON:

The expense to expand the programs to the degree necessary is seven to eight million dollars. The Department advises me that the net cost after the savings, because of the additional beds saved, will be four million dollars this year.

PRESIDING OFFICER: (SENATOR WEAVER)

Senator del Valle.

SENATOR dEL VALLE:

Well, based on the—on the growth of the inmate population, I—I don't see how they could project a savings, because that population is going to continue to increase.

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Hawkinson.

SENATOR HAWKINSON:

Well, I think you raised a good point, Senator. I think seven or eight million is probably close, but the Depart-

ment estimates some cost savings of four million. As we refill these beds, I'm not sure where those cost savings will come from. But you're—you're on target. It is going to cost money, but I think it will cost less money than the alternative.

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Dunn.

SENATOR R. DUNN:

Thank you, Mr. President. I hate to interrupt a good debate, but I'd like a point of personal privilege, please.

PRESIDING OFFICER: (SENATOR WEAVER)

State your point.

SENATOR R. DUNN:

I have a group from Evansville, Illinois. The eighth grade in the gallery behind me here—thirty-three of them—and they've been up and been listening now for the debate, and let's welcome them to the Legislature.

PRESIDING OFFICER: (SENATOR WEAVER)

Will our guests in the gallery please rise? And welcome to Springfield, Senator Demuzio.

SENATOR DEMUZIO:

Well, thank you, Mr. President. Let me—I, too, rise to—to support this—this measure, and I only disagree with one thing that you've said, Senator Hawkinson. You—you indicated that we might be able to spend our way out of this. I don't think we're going to be able to spend our way out of this, and this thing. . . I probably have more prisoners incarcerated in my district, because of the fact of the number of prisons that I have in my district.

And I think electronic detention and some of the things that are other aspects in this bill, I think, are absolutely necessary, and I would rise to support this bill in its—in its total.

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Stern.

SENATOR STERN:

Mr. President and Members of the Senate, I don't think you need an additional support voice, but I think this is genuinely constructive legislation and precisely the kind of thing that we should be laying our emphasis on. We know these things work, and we should all be voting Yes on this. It's not a crisis that we're responding to, as we often are; this is constructive, long-range possible solutions to intransigent problems. Thank you.

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Fawell.

SENATOR FAWELL:

Thank you very much. Five years ago, four years ago, three years ago, and two years ago, I introduced a bill which gave good time for going to school and trying to educate these prisoners. It's nice to see that the—the rest of the Assembly has finally come around. It is true; about eighty-seven percent of our prisoners are functionally illiterate when they go into prison. If we don't start educating them, they're just going to turn right around. I—this is a good bill.

PRESIDING OFFICER: (SENATOR WEAVER)

Any further discussion? Senator Rea.

SENATOR REA:

Thank you, Mr. President. I just want to say that I think that with the serious problems that we have within our correctional facilities, I'm very pleased with the recommendations that have come back from the Task Force, and I feel that we should move as—as early as possible in the implementation of most of those recommendations. I think this bill addresses many of those concerns and certainly support it.

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Butler.

SENATOR BUTLER:

Thank you, Mr. President. I, too, support this, but I want to add a word of caution. I had a long conversation with a downstate judge over the weekend, and they are—there is apparent growing concern about good time and its net effect on the attitude of—of potential criminals; that is, he was saying he could sentence somebody to a year and they're out in fifty-nine days. And of course, that's—that same kind of mathematics works as the—as the sentence expands. The point is that I hope the Judiciary Committee takes a really good look at—at—at good time to make sure we're not going overboard and we're creating a negative attitude on the part of potential—let's call them potential prisoners.

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Hawkinson, to close.

SENATOR HAWKINSON:

Well, first, let me respond to a couple of comments. If I did, I certainly didn't intend to say we could spend our way out of this. It's going to be a very expensive propo-

sition. We cannot build our way out. I did indicate I think we probably are going to have to build some more, however. But that's not in this bill either, although we do recommend as part of the Task Force a super max prison and some additional construction. Senator Butler, I share your concerns on good time. As a matter of fact, I think eventually we ought to move to do away for all—with all the day-to-day good time that's given out automatically and replace it completely with an earned time concept; that you have to earn it by getting an education or getting your drug abuse training or getting a skill through correctional industries. We balanced it in this report by not allowing the most serious offenders to get this new good time. The Class X offenders—your robbers, your rapists—they are not eligible. And this bill does not make them eligible for that kind of good time. But the evidence has shown that for those who we've already made eligible, that if they get the education, if they get the skill, they are less likely to be back within a year having committed another crime upon our citizens. And that's why it is recommended in this Task Force. I think it's important that we pass this part of the package, and I would urge your Aye vote.

PRESIDING OFFICER: (SENATOR WEAVER)

The question is, shall Senate Bill 956 pass. Those in favor will vote Aye. Those opposed will vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Take the record, Madam Secretary. On that question, the Ayes are 53, the Nays are 1, none voting Present. Senate Bill 956, having received the constitutional majority, is declared passed.

ORIGINAL

No. 94-1583.

SUPREME COURT, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ODIE WASHINGTON, Director, Illinois Department of Corrections, in his official capacity,

Petitioner,

v.

MICHAEL BARGER and RICHARD MABZ, individually and on behalf of all others similarly situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether application of an Illinois statutory amendment that entirely eliminates prisoners' opportunity to earn enhanced educational good conduct credit--when the prisoners were eligible to earn such credit under the law in effect at the time they committed the offenses for which they are incarcerated--violates the United States' Constitutional prohibition against ex post facto laws?

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ARGUMENT: REASONS FOR DENYING THE WRIT

I. INTRODUCTION.

On November 19, 1993, Respondents filed this class action in the Circuit Court of Cook County challenging Petitioner's application to them of a 1993 statutory amendment--Illinois Public Act ("P.A.") 88-311 (Pet. Br. App. pp. 16-19)--that entirely eliminates their opportunity to earn the enhanced educational good conduct credit (day-for-day good conduct credit multiplied by 1.25) for which they were eligible--pursuant to P.A. 86-1373 (Pet. Br. App. pp. 20-22)--at the time they committed the offenses for which they are incarcerated.[1] Respondents alleged that subjecting them and others similarly situated to the statutory amendment to P.A. 86-1373--P.A. 88-311--and the Rules promulgated thereunder violated their rights under the ex post facto clauses of the Illinois (art. I, § 16) and United States (art. I, § 10) Constitutions. The persons rendered ineligible to earn enhanced educational good conduct credit included both prisoners in an Illinois Department of

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[1] The reason why the Illinois legislature enacted a retrospective amendment that took away from Respondents the opportunity to earn enhanced educational good conduct credit is likely the same reason rejected in Devine v. New Mexico Dep't of Corrections, 866 F.2d 339, 344 (10th Cir. 1989):

> In our view, it is potentially as arbitrary and vindictive to retroactively enhance punishment for particular conduct, as it is to make particular conduct criminal. The desire to require certain classes of offenders to spend more time in prison is indistinguishable from the desire to make certain past conduct criminal. It has its roots in the same phenomenon--increased disapproval of particular conduct; and it has the same effect--requiring individuals to suffer greater punishment than previously mandated.

Corrections ("IDOC") educational program who, prior to the effective date of the amendment, had been earning enhanced educational good conduct credit, and prisoners awaiting entry into an educational program. Although Respondents continued to be placed in IDOC educational programs, they were no longer eligible to earn enhanced educational good conduct credit.

On February 8, 1994, the Circuit Court of Cook County entered a final order: 1) declaring that application of P.A. 88-311 to Respondents so as to deprive them of the opportunity to earn enhanced educational good conduct credit violated the Illinois and United States Constitutions, and 2) enjoining Petitioner from applying P.A. 88-311 and the Rules promulgated thereunder to Respondents so as to deprive them of the opportunity to earn enhanced educational good conduct credit. (Pet. Br. App. pp. 12-14).

On December 22, 1994, the Illinois Supreme Court affirmed the order of the Circuit Court of Cook County. Barger v. Peters, 645 N.E.2d 175 (1994). Contrary to Washington's claim that the Illinois Supreme Court held that "any reduction in the scope of the [educational] program would violate the ex post facto clause for those adversely affected" (Pet. Br. p. 8), the Illinois Supreme Court held only that application of P.A. 88-311 to Respondents so as to deprive them of the opportunity to earn the enhanced educational good conduct credit for which they were eligible at the time they committed the offenses for which they are incarcerated violated the ex post facto clauses of the Illinois and United

States Constitutions. Id. at 177-178.

On March 22, 1995, Washington filed his Petition for Writ of Certiorari with this Court. Only the Federal Constitutional claim is before this Court.

Because this case involves no new question of law but rather is consistent with decisions of this Court, with decisions of the federal appellate courts, and with decisions of the highest sister state courts, and because this case affects a limited and ever-decreasing number of persons, this Court should not revisit the well-settled issues raised in this litigation. Washington's Petition for Writ of Certiorari should be denied.

II. THE DECISION OF THE ILLINOIS SUPREME COURT THAT APPLICATION OF AN ILLINOIS STATUTORY AMENDMENT THAT ENTIRELY ELIMINATES PRISONERS' OPPORTUNITY TO EARN ENHANCED EDUCATIONAL GOOD CONDUCT CREDIT--WHEN THE PRISONERS WERE ELIGIBLE TO EARN SUCH CREDIT UNDER THE LAW IN EFFECT AT THE TIME THEY COMMITTED THE OFFENSES FOR WHICH THEY ARE INCARCERATED--VIOLATES THE UNITED STATES' CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. Washington Has Misstated the Issue in This Case.

Washington has failed to state correctly the issue in this case. (Pet. Br. pp. 7-8). Contrary to his assertion, Respondents do not challenge the state's right to experiment with "incarceration programs." (Pet. Br. p. 8). Furthermore, Respondents do not challenge Washington's discretion whether or not to place a prisoner in an educational program, his discretion whether or not to terminate a particular educational program because of limited "fiscal resources appropriated by the General

Assembly for such purpose" (P.A. 86-1373 and P.A. 88-311), nor his discretion whether or not a particular Respondent has satisfactorily completed an IDOC educational program. Respondents challenge only application of P.A. 88-311 to them so as to deprive them of the opportunity to earn enhanced educational good conduct credit upon successful completion of an IDOC educational program.

In fact, the IDOC educational program continues in operation just as it did at the time Respondents committed the offenses for which they are incarcerated, and the IDOC continues to place Respondents in these programs. The only difference is that Respondents are no longer eligible to earn enhanced educational good conduct credit because of the retrospective application to them of P.A. 88-311. For example, Respondent Barger was attending an educational program and receiving enhanced educational good conduct credit for successful completion of the program's requirements on August 10, 1993. He continued in the same educational program, but effective August 11, 1993, he was no longer eligible to receive--and did not receive--enhanced educational good conduct credit upon his successful completion of the program. Barger's experience is typical of the experience of the members of the plaintiff class.

B. The Decision of the Illinois Supreme Court Is Consistent With Applicable Decisions of This Court.

The Illinois Supreme Court correctly grounded its decision in Barger on this Court's decisions in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Beazell v. Ohio, 269 U.S. 167 (1925); Weaver v.

Graham, 450 U.S. 24 (1981); and Collins v. Youngblood, 497 U.S. 37 (1990). Barger, 645 N.E.2d at 176-177. Washington's assertion that Barger conflicts with these decisions is simply wrong.

Calder, the foundation stone of ex post facto case law, held that a retrospective law that "inflicts a greater punishment, than the law annexed to the crime, when committed" violates the constitutional prohibition against ex post facto laws. Calder, 3 U.S. (3 Dall.) at 390. In Beazell, this Court stated: "It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute...which makes more burdensome the punishment for a crime, after its commission" violates the ex post facto clause of the United States Constitution. Beazell, 269 U.S. at 169.

Citing, inter alia, Calder, this Court held in Weaver that a statutory change in Florida's formula for calculating "gain-time" credit which "disadvantaged" prisoners violated the ex post facto prohibition of art. I, § 10 of the United States Constitution. Weaver, 450 U.S. at 29, 33. The Florida statute in place at the time Weaver committed the offense for which he was incarcerated provided that prisoners would earn gain time credit if they committed no violations of administrative rules and regulations or of state laws and performed assigned work, duties, and tasks "in a faithful, diligent, industrious, orderly and peaceful manner." Weaver, 450 U.S. at 26. Contrary to Washington's assertion (Pet. Br. p. 11), the award of gain time was not automatic, but rather was awarded only for good behavior. Id.

The Florida legislature subsequently amended the formula for awarding gain time to reduce significantly the amount of gain time prisoners could earn, thereby lengthening the period of their incarceration. Id. Weaver held that the application of the amendment to prisoners who committed prior to the amendment the offenses for which they were incarcerated was a retrospective increase in punishment, one of the categories of ex post facto laws proscribed in Calder. Id. at 35-36; Calder, 3 U.S. (3 Dall.) at 390.

In reaching its decision in Weaver, this Court understood full well that prolonged incarceration is "punishment", and it is in that sense that this Court held that retrospective application of the amended law "disadvantaged" Weaver. See People v. McVickers, 840 P.2d 955, 957 (Cal. 1992) (stating that "there is little dispute that additional jail time or extra fines are punishment") (citing Weaver). In Barger, it is undisputed that Respondents' period of incarceration has been or could be lengthened as a result of application to them of P.A. 88-311.

The facts of Weaver are directly on point with the facts of this case. In Weaver, the award of gain time depended on prisoners' good behavior and satisfactory job performance. Weaver, 450 U.S. at 26. In this case, the award of enhanced educational good conduct credit depends on the satisfactory completion of the educational program to which a prisoner may be assigned. P.A. 86-1373 and P.A. 88-311. That assigning a prisoner to an educational program requires the exercise of Washington's

cretion is irrelevant to the ex post facto analysis. As Weaver ted, "a law need not impair a 'vested right' to violate the ex st facto prohibition." Weaver, 450 U.S. at 29.

Washington argues that this Court's decision in Collins v. ungblood, 497 U.S. 37 (1990) effectively overrules Weaver. (Pet. . pp. 11-13). In light of the issue in Collins--reformation of improper jury verdict--and the proceedings before this Court, shington's argument is frivolous. In Collins, this Court viewed the long history of ex post facto case law and pecifically overruled two cases--Kring v. Missouri, 107 U.S. 221 1883) and Thompson v. Utah, 170 U.S. 343 (1898), but not Weaver. ollins in no way undermines the validity of the Weaver analytic ramework, which is consistent with Calder.[2]

Barger does not conflict with any decision of this Court. On he contrary, the decision of the Illinois Supreme Court in Barger s consistent with all relevant decisions of this Court.

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[2] All parties in Collins recognized the continuing validity of Weaver. Indeed, in his opening brief, Petitioner Collins, Director of the Texas Department of Criminal Justice, stated:

> More recently, in both Weaver v. Graham and Miller v. Florida, the Court found a constitutional defect in the retroactive application of changes in the law that increased the amount of time prisoners must serve before achieving eligibility for parole. In both cases, the Court recognized that the change in law effectively added to the punishment that was prescribed at the time when the crime was consummated. Miller, 482 U.S. at 433-34; Weaver, 450 U.S. at 33. Again, the results reached are in harmony with Calder.

Petitioner's Brief at 20, Collins, 497 U.S. 37 (1990).

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gain time--basic and incentive--"a prisoner must satisfy certain conditions [and]...[i]n both cases, the department decides in its sole discretion whether the prisoner has behaved well enough or worked diligently enough to earn gain time." Id. at 1499. Consequently, the court held that retrospective application of a reduction in the amount of incentive gain time that a prisoner could earn violated the prohibition against ex post facto laws. Id. at 1502.

The situation in Raske is virtually identical to that of the Respondents in Barger: the IDOC has discretion to decide whether to maintain educational programs, whether to assign prisoners to those programs, and whether a particular prisoner has completed the program satisfactorily. P.A. 86-1373. But this IDOC discretion is irrelevant to ex post facto analysis. What is key, and what the Eleventh Circuit recognized, is "whether a prisoner is 'disadvantaged by the reduced opportunity to shorten his time in prison.'" Id. at 1500 (citing Weaver, 450 U.S. at 33-34) (emphasis in original). There is no question that Respondents in this case, like the prisoners in Raske, have lost absolutely the opportunity to shorten their time in prison by successful completion of IDOC educational programs because of the retrospective application to them of P.A. 88-311.

Washington argues that the Florida case of Hock v. Singletary, 41 F.3d 1470 (11th Cir. 1995), recently decided by the Eleventh Circuit, is inconsistent with the Illinois Supreme Court's decision in Barger. (Pet. Br. pp. 9-10). Washington is wrong. In Hock,

the Eleventh Circuit distinguished Florida's basic and incentive gain time statutes at issue in Raske, 876 F.2d at 1499, 1500, on the one hand, from the Florida "control release" statute involving the award of "provisional credits", on the other hand, that automatically took effect whenever the population of the Florida Department of Corrections ("DOC") exceeded a set percentage of capacity. The court held that a reduction in the amount of basic and incentive gain time that a prisoner could earn violated the constitutional prohibition against ex post facto laws, but that retrospective application of the control release/provisional credits statute did not. Hock, 41 F.3d at 1472. The court reasoned that the Florida control release/provisional credits statute, unlike the basic and incentive gain time statutes, reduced the period of incarceration "automatically for the convenience of the [Florida] Department of Corrections." Id. Execution of the control release statute was totally independent of prisoners' institutional behavior: they could neither earn nor forfeit eligibility for control release. The Florida Supreme Court's approach to these statutes--basic and incentive gain time, on the one hand, and control release, provisional credits/administrative gain time, on the other hand--is precisely that of the Eleventh Circuit. See discussion infra pp. 14-16.

In support of his argument that Hock conflicts with Barger, Washington argues that the Illinois General Assembly enacted the educational good conduct credit statute to reduce overcrowding, so that comparable to the control release/provisional credits statute

at issue in Hock, retrospective application of P.A. 88-311 to Respondents is not ex post facto. (Pet. Br. p. 8). Washington's argument is at best grounded in an erroneous premise. P.A. 86-1373 was not enacted to relieve overcrowding, but rather to provide an incentive for prisoners to earn early release through good behavior and to increase the likelihood of their post-release success in the free community. See Illinois Task Force on Crime and Corrections, Part II: Recommended Programs to Reduce Recidivism, Chapter 4: Earned-Time Credit Program, in Final Report 25, 27 (1993) (Resp. Br. App. pp. A-1, A-3).

Furthermore, Washington's claim makes no sense. If P.A. 86-1373 was enacted to relieve overcrowding, it would be nonsensical to continue Respondent Barger and the other Respondents in IDOC educational programs: they are taking up limited educational slots but are not shortening their prison time and, therefore, are not relieving overcrowding. However, Barger and the other Respondents continue to be placed in IDOC educational programs. They just no longer earn enhanced educational good conduct credit.

In Wallace v. Cody, 951 F.2d 1170, 1171-1172 (10th Cir. 1991), the court agreed with the Oklahoma state appellate court that any change in the state's earned credit statute that disadvantaged--through prolonged incarceration--prisoners who committed the offenses for which they were incarcerated prior to the effective date of the change violated the prohibition against ex post facto laws. The court remanded the case to the district court for a determination whether the particular petitioner for a writ of

habeas corpus was in fact disadvantaged, i.e., subjected to prolonged incarceration, by the statutory amendment and, if so, for a recalculation of his earned credits. Id.

Petitioner believes that the federal appellate case of California Dep't of Corrections v. Morales, 16 F.3d 1001 (9th Cir.), cert. granted, ___ U.S. ___, 115 S.Ct. 40 (1994), currently pending before this Court, is "significantly related" to Barger. (Pet. Br. p. 9, n.2). Contrary to his assertion, the facts and judicial history of Morales differ significantly from those of Barger. The California Supreme Court and the Eleventh Circuit Court of Appeals differed as to whether retrospective application of a disadvantageous change in the frequency of parole hearings violated the constitutional prohibition against ex post facto laws. Compare In re Jackson, 703 P.2d 100, 105 (Cal. 1985) with Morales, 16 F.3d at 1004. The California Supreme Court had held that the change in frequency of parole hearings was merely procedural and therefore not a prohibited ex post facto law while the Ninth Circuit Court of Apppeals held that the change was substantive and did violate the constitutional prohibition against such laws. The analogous situation in Illinois is quite different. In Tiller v. Klincar, 561 N.E.2d 576 (1990), cert. denied, 498 U.S. 1031 (1991), the Illinois Supreme Court, unlike the California Supreme Court in Jackson, determined that a reduction in the frequency of parole hearings did violate the Illinois and Federal Constitutional prohibitions against ex post facto laws. Unlike Morales, there is no conflict in Barger between a decision of the Illinois Supreme

Court and a federal appellate court.

Barger is consistent with all relevant decisions by the federal appellate courts. Each of these decisions correctly follows Calder and its progeny, as does Barger.

2. State Supreme Court Decisions.

The Barger decision is also consistent with all relevant decisions of the highest courts of sister states. There are no state court cases that conflict with Barger and a number of cases directly on point in accord.

Washington's policy argument that Barger somehow interferes with the ability of Illinois and other states to design innovative programs to reduce recidivism misses the point of this litigation. (Pet. Br. p. 8). Respondents do not argue that the Illinois General Assembly could not have changed its collective mind, enacted P.A. 88-311, and applied it prospectively, i.e., to persons who committed on and after August 11, 1993 the criminal acts for which they would be incarcerated. Such a limitation would have prevented Illinois from running afoul of the constitutional prohibition against ex post facto laws. Unfortunately, the Illinois General Assembly failed to do so, and that failure violates the constitutional prohibition against ex post facto laws.

Contrary to Washington's assertion that Barger will cause confusion, all of the highest courts in the states which have wrestled with issues analogous to that presented by Barger are consistent with Barger. (Pet. Br. p. 9). For example, the Florida Supreme Court in Waldrup v. Dugger, 562 So. 2d 687, 692 (Fla. 1990)

held that retrospective application of a change in the incentive gain time statute constituted a violation of the constitutional prohibition against ex post facto laws because such application could have the effect of increasing the prisoner's period of incarceration. Incentive gain time was awarded only to inmates who performed "satisfactory and acceptable" work. Id. at 689. The incentive gain time at issue in Waldrup is indistinguishable from the enhanced educational good conduct credit at issue in Barger.

In Waldrup, just as in Barger, the state argued that incentive gain time was a "mere expectancy" dependent on the discretion of the Florida DOC and therefore not subject to the prohibition against ex post facto laws. Waldrup, 562 So. 2d at 692. To the state's argument, the court responded:

> Indeed, the argument advanced by the state sounds very much like the discredited analysis employed by this Court in Harris v. Wainwright, 376 So. 2d 855 (Fla. 1979)...[which] [t]he United States Supreme Court in Weaver directly overruled....
>
> ....
>
> ...Weaver applies as fully to discretionary gain-time as it does to 'mandatory' gain-time....Even the 'grace' of the legislature, once given, cannot be rescinded retrospectively.

Id.

Just as the Eleventh Circuit in Hock distinguished the ex post facto implications of Florida's basic and incentive gain time statutes, on the one hand, from its control release/provisional credits/administrative gain time statute, on the other hand (see discussion supra pp. 9-11), so also has the Florida Supreme Court. Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994), and Dugger v.

The Illinois Task Force on
Crime and Corrections

Final Report

Anton R. Valukas
Chairman

March 1993

Earned-Tin Credit Prograr

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A principal reason why Illinois prisons are as crowded as they are today, and why crowding gets worse with time, is recidivism. As noted in the Introduction, research, in Illinois and other states, confirms that a sizeable percentage of inmates released from prison today — as many as 46 out of every 100 — will be back behind bars within three years.

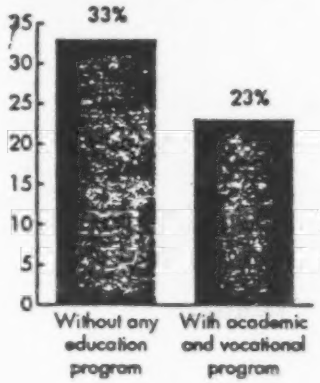
Research also suggests that recidivism can be reduced (and employment levels increased) among offenders who participate in meaningful educational and work programs while they are incarcerated. In a 1988 study, the Illinois Council on Vocational Education found that nearly one-third of inmates who did not participate in any educational programs while in prison were rearrested within one year of their release. But for inmates who received both academic and vocational training, the rearrest rate was substantially lower — 23 percent.

The success of vocational training is also borne out by research at the federal level. The Post-Release Employment Project (PREP), a study by the Bureau of Prisons' Office of Research and Evaluation, supports the view that prison training programs have a positive impact on participants. Initial PREP results indicate that inmates who receive vocational training and experience during their incarceration are less likely to receive misconduct reports in prison, more likely to be employed during their halfway house stay and after release, and less likely to recidivate than similar inmates who are not trained during their imprisonment.

To take advantage of these successes, Illinois implemented an education earned-time credit program in 1991. This program rewards inmates who enroll in full-time academic or vocational classes and who meet specific educational goals: for every four days an inmate participates in an educational program, his or her prison stay is reduced by an additional one day. Experience with the education earned-time credit in Illinois demonstrates the potential of the Earned-Time Credit concept. Since its implementation over two years ago, a total of 10,441 education earned-time credit awards have been received (an inmate may receive more than one award). The average award amount is 21 days per inmate. Inmates who want to participate in the current program express their interest to the education department at the institution. Depending on the inmate's academic abilities and availability of classes, he or she is placed in the appropriate class or — and this presents a problem that will have to be resolved — on a waiting list.

Currently more than 8,800 adult inmates and 1,400 youths in 35 correctional institutions are served monthly by School District 428, the Department of Corrections' own school district. Most of these participants are attending an academic course. During FY92, 64 different vocational programs were made available to inmates. The Department of Corrections contracts with community and four-year colleges for vocational and higher education programs. In FY92, 1,935 GED certificates, 2,654 vocational

Percentage of Illinois inmates released from prison who were rearrested within one year



Degrees and certificates earned by inmates during fiscal 1992

GED	1,935
Vocational certificates	2,654
Associate degrees	368
Bachelor degrees	91

activities for which credit is given must be expanded substantially so that waiting lists are eliminated and all eligible inmates can have access to these activities soon after their arrival at a penitentiary. If the Department's experience with the education earned-time credit holds, a broader system of earned-time credits — based on strong incentives and backed up by sufficient program capacity — should reduce recidivism and ultimately reduce correctional crowding and costs.[1]

Recommendation 1

Expand the Earned-Time Credit Program to include participation in correctional industries and substance abuse education and treatment activities, and increase the amount of earned-time credit an inmate can earn.

This recommendation would change the current statute authorizing the Department of Corrections to give earned-time credits, 730 ILCS 5/3-6-3. Specifically, the statute should be amended to:

1. Allow inmates participating in correctional industries and drug education and treatment programs, as well as in educational and vocational programs, to earn credit upon successful completion of those programs.
2. Increase the amount of earned-time credit awarded from .25 days to .5 days.
3. All inmates would be eligible for the Earned-Time Credit Program *except* for: (a) inmates assigned to mental health units, boot camps, and electronic detention; and (b) inmates serving sentences for any of the following offenses (or any predecessor or successor offenses with the same or substantially the same elements):
   - First-Degree Murder, 720 ILCS 5/9-1;[2]
   - Criminal Sexual Assault, 720 ILCS 5/12-13;
   - Aggravated Criminal Sexual Assault, 720 ILCS 5/12-14;
   - Criminal Sexual Abuse, 720 ILCS 5/12-15;
   - Aggravated Criminal Sexual Abuse, 720 ILCS 5/12-16;
   - Aggravated Battery with a Firearm, 720 ILCS 5/12-4.2;
   - Bringing Contraband into, or Possessing Contraband in, a Penal Institution (relating solely to firearm, firearm ammunition, or explosive contraband), 720 ILCS 5/31A-1.1(j);
   - Any "Super-X" Drug Offense, 720 ILCS 570/401(a)(1)(B), (C), (D); 401(a)(2)(B), (C), (D); 401(a)(3)(B), (C), (D); 401(a)(7)(B), (C), (D);
   - Calculated Criminal Drug Conspiracy, 720 ILCS 570/405; and
   - Inchoate offenses relating to the foregoing offenses (where applicable), 720 ILCS 5/8-1, 5/8-1.1, 5/8-1.2 (Solicitation); 5/8-2 (Conspiracy); and 5/8-4 (Attempt).[3]

Rationale

Currently, inmates enrolled full-time in the Department of Corrections' educational and vocational programs who are improving literacy or satisfactorily completing other academic or vocational training programs receive .25 days of credit for each day of program participation. This credit is in addition to other forms of good-time credit (see the Addendum to this Chapter, Page 31, for more information on good-time). Inmates convicted of Murder or a Class X felony, and those who have previously participated in the program and are subsequently convicted of a felony, are not eligible under the current law.

This recommendation will create an expanded Earned-Time Credit Program that will allow more inmates to earn credit for a broader range of institutional activities; in addition to the current educational/vocational programs, participation in substance abuse education and treatment and correctional industries will also result in accumulating earned-time. The amount of earned-time will also be increased from .25 days to .5 days. The goal of these changes is to provide an incentive to inmates to participate in a broader range of meaningful activities that will increase the likelihood of their success after release, and thereby reduce their chances of returning to prison.

Recommendation 2 **Expand the number of educational, correctional industries, and substance abuse education and treatment programs to accommodate the recommended Earned-Time Credit Program, and provide the Department of Corrections with sufficient additional staff to safely and successfully implement and run these expanded activities.**

Rationale

The key to successful implementation of an expanded Earned-Time Credit Program in Illinois is providing sufficient high-caliber educational, vocational, substance abuse education and treatment, and correctional industries programs for inmates, with an ongoing commitment of the resources necessary to sustain these programs. While the Department of Corrections currently provides a variety of programmatic and work opportunities for inmates, these offerings are not sufficient to support existing demand, and could not sustain an expanded Earned-Time Credit Program.[4] An expansion of the Department of Corrections' Earned-Time Credit Program will require an equally significant expansion and enhancement of in-prison programs and assignments.

Throughout the nation, correctional systems are faced with the same challenge, allocating scarce resources to in-prison programs, while meeting the more basic and critical requirements of security, clothing, housing, and medical care. Quite often, educational and treatment programs are shortchanged in the competition. Unfortunately, these are the programs that offer the best opportunity to help reduce the probability of inmates returning to prison.

For example, in the Department of Corrections today, there are approximately 5,000 inmates assigned to general laborer duties, which include cellhouse help, runners, lawn workers, laundry handlers, and janitors. If more meaningful assignments in correctional industries or in educational and treatment programs were available, many of these inmates could use their time more productively, while receiving earned-time credit. The Task Force is recommending the expansion of Illinois' Correctional Industries (ICI) program to allow more inmates to participate in meaningful and beneficial work assignments (see Chapter 10). Currently 1,300 inmates are involved in ICI, learning job skills and work habits that are transferable to the community when released.

If more meaningful assignments in correctional industries or in education and treatment programs were available, many of the 5,000 "general laborer" inmates could use their time more productively.

Similarly, the Department's School District 428, which is the third largest school district in the State, currently serves over 8,800 inmates monthly, most of whom are enrolled in academic courses. While every Department of Corrections institution provides some type of academic and vocational programs for inmates, because of budget cuts, only 31 percent of the total institutional population is being served by School District 428. Four out of every five inmates surveyed at the time of admission to the Department of Corrections indicate they want to enroll in an educational program, but only one in three actually enrolls. One of the primary reasons cited was the long waiting lists for popular courses.

The Department's treatment programs, including substance abuse and mental health programs, are also limited and serve only a small portion of the inmates who require assistance. Currently, there are three in-prison residential drug treatment programs funded by either the Department of Alcoholism and Substance Abuse or the Illinois Criminal Justice Information Authority. These programs provide individual and group counseling to 45 inmates at Graham Correctional Center, 45 inmates at Sheridan Correctional Center, and 32 inmates at Dwight Correctional Center. Although it is estimated that approximately 70 percent of the Department's inmate population have a reported history of substance abuse, treatment programs currently serve less than 1 percent (244) of the 32,000 inmates now in prison. As recommended in Chapter 5 of this Report, a 500-bed pre-release drug treatment program should be implemented by the Department of Corrections to serve approximately 1,000 inmates annually as an initial step toward meeting the broader treatment needs of offenders.

Recommendation 3

The Director of Corrections should be directed to provide regular biennial reports on the Earned-Time Credit Program to the Governor and General Assembly, and should be authorized to request the General Assembly and the Governor to add to the list of programs for which earned-time credit is given.

The Earned-Time Credit Program is designed to encourage inmates to simultaneously "earn their way out" and "learn to stay out."

Rationale

The Earned-Time Credit Program is designed to reduce prison crowding not by letting inmates out early, but by encouraging them to improve themselves as a means to simultaneously "earn their way out" and "learn how to stay out." To this end, the Task Force has selected three programs (education, correctional industries, and substance abuse education and treatment) because research suggests that participation in these programs reduces recidivism. This recommended reporting requirement will enable the General Assembly and Governor to determine whether these programs have this salutary effect. In the unlikely event that they do not, then the Earned-Time Credit Program should be reassessed.

If, as we anticipate, however, there is a statistically significant reduction in recidivism among participants, the Director should be encouraged to try to expand the Earned-Time Credit Program to include other activities and programs that have demonstrated the ability to reduce recidivism. For example, it may be that credit could be given for certain institutional work assignments that require the development and use of skills that would assist an inmate in finding a job in the community upon release (for example, in carpentry, plumbing, or heating/air conditioning repair). Similarly, there may be a program or programs specifically designed to address issues unique to female offenders that might reduce their recidivism levels.

Finally, the Director should use this biennial report to inform the Governor and General Assembly of the adequacy of funding and staffing for the anti-recidivism activities that form the basis for the Earned-Time Credit Program. Given the importance of these activities to this program, and the importance of this program to the overall response to prison crowding, this reporting function will be of crucial importance. The Task Force believes that the State will be best served by establishing regularly scheduled formal communications between the Director and the Governor and General Assembly in regard to the Earned-Time Credit Program.

Population and Cost Impact

Modification to statutory eligibility criteria	Program expansion needed	Population reduction		Gross cost savings		Program expansion costs
		Year 1	Year 3	Year 1	Year 3	
1. Increase the amount of earned-time an inmate may earn and make correctional industries programs and substance abuse education/treatment programs eligible for earned time.	None	794	1,525	$2,495,542	$4,793,075	None
2. Expand the number of educational, correctional industries, and substance abuse education/treatment programs by 5,000.	5,000	1,498	2,881	$4,708,214	$9,054,983	$6,922,000*

* Program costs include expansion of educational, substance abuse education/treatment, and correctional industries programs. Cost estimate of $2.5 million to expand new programs for correctional industries requires increased expenditure authority for Illinois Correctional Industries but does not increase the Department's operating budget and is not included here as a program cost. Expense for residential drug treatment program is included in Chapter 5.

Addendum

Current Good-Time Credit Program

Like most states, Illinois has a statutorily authorized good-time program for inmates incarcerated in state prison. *Good-time*, which reduces an inmate's period of incarceration for good conduct, has become an important and necessary population management tool for prison systems throughout the country. For example, most inmates sentenced to the Illinois Department of Corrections for 10 years, will actually serve less than five, a fact understood by judges, prosecutors, defense counsel and other participants in the criminal justice system, including offenders. Even with these good-time credits, however, inmates convicted of the most serious crimes in Illinois today are serving longer sentences than similar offenders convicted under the previous indeterminate sentencing structure.

Illinois' Unified Code of Corrections (730 ILCS 5/3-6-3) sets forth the provisions by which offenders receive good-time credits from the Illinois Department of Corrections. According to these provisions, the Department of Corrections is authorized to provide offenders with the following good-time credits, subject to review by the Prisoner Review Board:

1. *Good-conduct credit (day-for-day good-time)*: Provides one day of good-conduct credit for each day of service in prison other than where a "natural life" sentence has been imposed. Each day of good-conduct credit reduces by one day the inmate's period of incarceration.
2. *Meritorious good-conduct credit (meritorious good-time)*: Authorizes the Director of Corrections, as deemed appropriate, to award up to 90 days good-conduct credit to inmates for meritorious service, in addition to day-for-day good-time.
3. *Supplemental meritorious good-conduct credit (supplemental meritorious good-time)*: Added as an amendment to the meritorious good-conduct provision in 1990. Allows the Director of Corrections to provide eligible inmates with an additional 90 days good-time, essentially doubling the meritorious good-conduct credit for eligible inmates. Inmates convicted of certain serious crimes, including first-degree murder, reckless homicide while under the influence of alcohol or drugs, kidnapping, criminal sex offenses, and offenses against children are not eligible for this credit.
4. *Educational credit (earned good-time)*: Provides that inmates participating full-time in approved Department of Corrections educational/vocational programs aimed at improving literacy or satisfactorily completing other academic or vocational programs shall receive 1.25 days of good-conduct credit for each day of program participation. (Actually, this credit of .25 days is added to the day-for-day good-time.)

This statute also empowers the Prisoner Review Board to order that an inmate serve up to one year of the sentence imposed by the court which was not served due to the accumulation of good-conduct credits.

Illinois' Good-Time Credit Program Defined

Good-conduct credit: Provides one day of good-conduct credit for each day of service in prison other than where a "natural life" sentence has been imposed.

Meritorious good-conduct credit: Authorizes the Director of Corrections to award up to 90 days good-conduct credit to inmates for meritorious service, in addition to day-for-day good-time.

Supplemental meritorious good-conduct credit: Allows the Director of Corrections to provide eligible inmates with an additional 90 days good-time, essentially doubling the meritorious good-conduct credit for eligible inmates.

Educational credit: Inmates participating full-time in approved Department of Corrections educational/vocational programs receive 1.25 days of good-conduct credit for each day of program participation (credit of .25 days added to day-for-day good-time).

Impact and Implications of Good-Time

While simple good-time programs have become widely recognized as an effective and necessary inmate management tool, these programs are not without controversy. In many cases, the public perception is that good-time for offenders can jeopardize public safety, undermine the general effectiveness and deterrent effect of corrections, and breed disrespect for the criminal justice system.

Recent evaluations found that Illinois' meritorious good-time programs had a significant impact on reducing prison population growth, but little or no negative impact on public safety.

Despite these criticisms, extensive research and evaluations of these strategies in Illinois and elsewhere have found that, when properly administered, they are safe and effective prison population management tools. Evaluations of Illinois' meritorious good time (MGT) and supplemental meritorious good time (SMGT) programs conducted by the National Council on Crime and Delinquency (NCCD) found that MGT and SMGT were safe and cost-effective methods for alleviating prison crowding in Illinois. NCCD recommended that these programs not only be retained, but also be expanded.

Data collected by NCCD on Illinois' MGT and SMGT programs portray their significant impact on Illinois' prison population growth. NCCD found that since its implementation in 1980, Illinois' MGT program had reduced the projected inmate population by almost 10 percent. More specifically, between 1980 and 1984, over 5,900 "prison years" were averted through use of MGT. In terms of corrections and criminal justice expenditures during this same time frame, the MGT program saved the State nearly $49 million in prison operating costs.

Similarly, NCCD's 1991 evaluation of Illinois' SMGT program found that by the end of the fiscal year 1992, the SMGT program had reduced the Department of Corrections' projected prison population by 2,766 inmates. According to NCCD, the projected combined effect of the MGT and SMGT programs will be to reduce Illinois' projected prison population by 8,200 inmates from what it would have otherwise been in the year 2000.

NCCD's evaluation also found that Illinois' MGT and SMGT programs had little or no negative impact on public safety. The study found that recidivism rates for inmates released under the MGT and SMGT programs were essentially the same as for other releasees. Only one-half of 1 percent of all reported crimes could be attributed to the MGT and SMGT programs.

Notes

[1] The Task Force also acknowledges the efforts of private and religious groups who operate privately funded programs that assist in reducing recidivism. For constitutional, legal, and practical reasons, these programs are not a part of the Earned-Time Credit Program, but the Task Force notes that many of these groups have had a successful record in reducing recidivism. The Task Force applauds their efforts and urges these private groups to continue to work to reduce recidivism with inmates and releasees.

[2] The Task Force had considerable discussion concerning whether persons convicted of Second-Degree Murder, 720 ILCS 5/9-2, should be eligible for the Earned-Time Credit Program. Recognizing the seriousness of the offense, we also recognize very strong arguments for including persons convicted of Second-Degree Murder in the Earned-Time Credit Program. We note, for example, that Second-Degree Murder is a Class 1 felony and is probationable, and that victims of domestic violence who kill an abusive partner may be convicted of this offense. We urge the General Assembly to give careful consideration to this issue.

[3] There are other violent Class X crimes that the General Assembly may wish to consider excluding from this program, including Aggravated Arson, 720 ILCS 5/20-1.1, Aggravated Kidnapping, 720 ILCS 5/10-2, and Home Invasion, 720 ILCS 5/12-11. The Task Force urges the General Assembly to be specific in its selection of exclusions, because there are Class X offenders, particularly those convicted of drug offenses, and perhaps some three-time Class 1 or 2 offenders, who stand to benefit greatly from the substance abuse treatment and other anti-recidivism aspects of this program.

[4] The current education earned-time statute, 730 ILCS 5/3-6-3, has a provision that releases the Department of Corrections from liability because of an inability to provide sufficient educational program resources. The Task Force recommends expanding the scope of this statute by adding the bracketed (or similar) language:
"The inability of any inmate to become engaged in any such educational [, correctional industries, substance abuse, or other] program [for which earned-time credit is given] by reason of insufficient program resources or for any other reason established under the rules and regulations of the Department shall not be deemed a cause of action under which the Department or any employee or agent of the Department shall be liable for damages to the inmate."
730 ILCS 5/3-6-3(a)(4).